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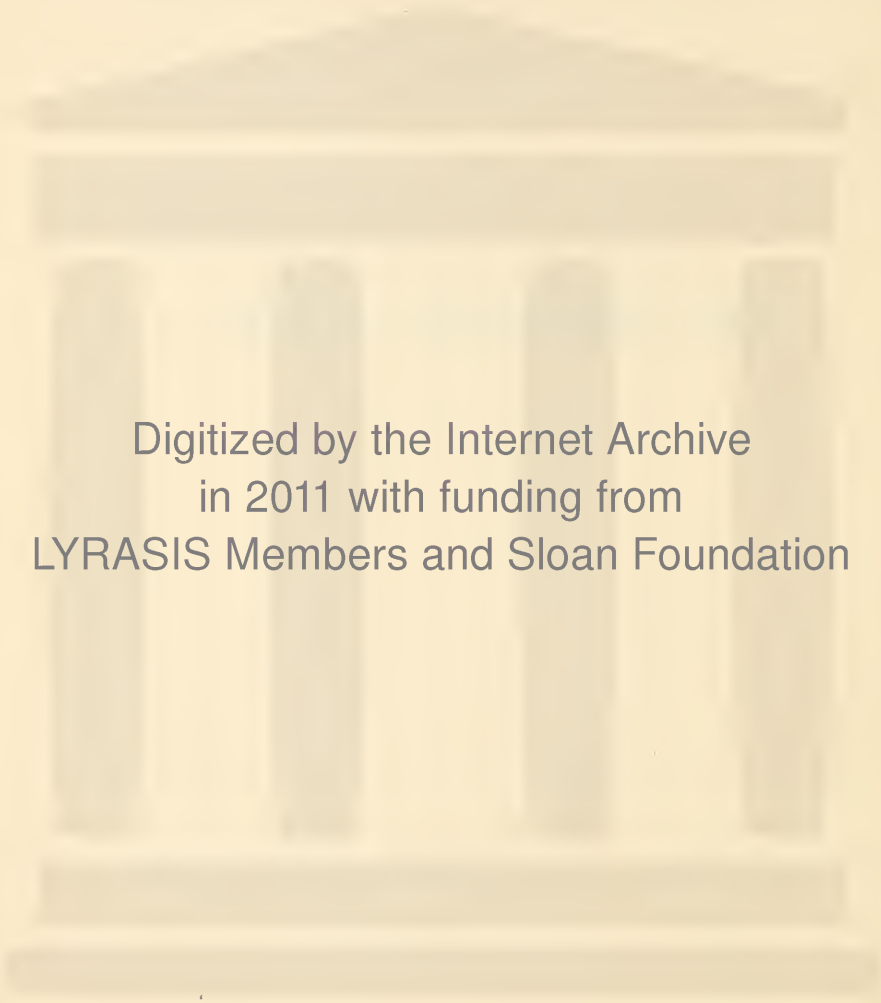

THE PRESIDENCY TODAY

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NEW YORK UNIVERSITY PRESS
Washington Square, New York 1956

Library of Congress catalogue card number: 56-7840

manufactured in the United States of America

Contents

Introduction

TODAY'S PRESIDENCY is tridimensional. It embraces leadership of the people in social and economic reform — an activity that transcends state lines and ignores "State Rights." It signalizes the elevation of the presidential office into a position of international, indeed planetary significance. At the same time, it connotes a household presence, friendly and familiar.

In the first of these roles the first Roosevelt led the way; in the second, Woodrow Wilson; in both roles the performance of the second Roosevelt outstripped that of his predecessors. The third role is the creation of modern science as represented especially by radio and television; and its most successful exponent to date is its latest, President Eisenhower.

Yet the future of the presidency is today shrouded in doubt, and for good reason when we consider the part that crisis has played in the expansion of its importance. Should one man have available the immense powers that are today the President's for the asking — indeed, for the taking? It seems to the authors that the time has arrived for us to recognize that crisis, and especially international crisis, has become a constant factor of national existence, and that reliance on intermittent recourse to presidential dictatorship is no longer the safe answer. What then is the safe answer? It seems to us that methods must be devised for making the national legislative powers more readily available when need

for important action arises. If, as we have elsewhere remarked, Nature abhors a vacuum, so does an age of crisis abhor a power vacuum. So, if the national legislative power is not at hand to assist in filling the vacuum, then it must be and will be filled by the power that is at hand at all times, that of the President. Most Americans, we may be sure, still desire to have legislation survive as an important technique of our national government.

A second, but not a secondary, task confronting our lawmakers, President and Congress, is some provision for the recurrent problem of presidential disability. Presidents have become disabled in office four times within little over a generation; yet no effort has been made to date to provide an assured procedure for the handling of such a situation, and the questions to which it gives rise. Americans are much too prone to trust their special Providence.

As a matter of some minor interest we wish to call attention to the fact that we have sedulously avoided the expression "the Congress" for "Congress." The former is the locution of the original Constitution, but Amendment I reads "Congress shall make no law," etc. Examination of presidential messages and of Supreme Court decisons shows that, except when they were quoting from the Constitution directly George Washington, Thomas Jefferson, John Marshall, Abraham Lincoln, and divers others always said "Congress." The authors of constitutional amendments seem, on the other hand, to have preferred the older expression, but not always, as *see* Amendments XIII and XIX. The recent vogue of "the Congress" owes much, no doubt, to President Wilson's use of it when on April 8, 1913, he went up to Capitol Hill to give his first message in person, thereby reviving a custom that had passed into disuse when Jefferson took over. Wilson's

opening words were: "Gentlemen of the Congress"; and of course, F.D.R. outdid all his predecessors in his enthusiastic employment of the new-old locution.

Most of our indebtednesses are sufficiently indicated in the footnotes, but there is one item in this account to which Professor Corwin desires to make special reference, and that is to the courtesy of President Paul Smith of Whittier College, California, in consenting to the appropriation here of a considerable part of an address which Professor Corwin gave at Whittier College in 1953 on "Presidential Prerogative."

Edward S. Corwin

Louis W. Koenig

Chapter I

The Presidency In Perspective[1]

SPECULATIVE WRITERS have sometimes traced the origins of government to a monarch in the forest who gathered in his person all power. At length wearying of his responsibilities, the hypothetical potentate delegated some of them to followers who eventually became courts and shared others with a more numerous body of subjects who in due time organized themselves into a legislature. The indefinite residuum, called executive power, he kept for himself.

Thus it happens that, whereas legislative power and judicial power today denote fairly definable *functions* of government as well as fairly constant *methods* for their discharge, executive power is still indefinite as to *function* and retains, particularly when it is exercised by a single individual, much of its original plasticity as regards *method.* It is consequently the power of government that is the most spontaneously responsive to emergency conditions; conditions, that is, that have not attained enough of stability or recurrency to admit of their being dealt with according to rule. The reversion of certain democracies within recent years in the presence of social and international crisis to more primitive types of government presents no cause for astonishment.

[1] Much of the matter in this chapter is taken from Corwin, *The President, Office and Powers* (3d ed., New York, 1948), Chapter I.

Indeed, agreement is general among students of government that the retention of democratic institutions depends today largely on the capacity of these to afford a matrix for strong executive leadership. What resources does our own Constitution offer in this respect? The answer brings under survey our practice and discussion for a hundred and sixty-five years.

"Executive Power"—A Term of Uncertain Content

Article II is the most loosely drawn chapter of the Constitution. To those who think that a constitution ought to settle everything beforehand it should be a nightmare; by the same token, to those who think that constitution-makers ought to leave generous scope for the future play of political forces it should be a vision realized.

We encounter this characteristic of Article II in its opening words: "The executive power shall be vested in a President of the United States of America." Do these words comprise a grant of power, or are they a mere designation of office? If the former, then how are we to explain the more specific clauses of grant in the ensuing sections of the same article? Some of these may no doubt be accounted for by the provision that they make for the participation of the Senate in the executive power; but several of them are not to be disposed of in this expeditious fashion. In the famous Oregon Postmaster Case of 1926 the difficulty is met by Chief Justice Taft with the statement that such clauses of specific grant lend "emphasis where emphasis is appropriate." This is an entirely novel canon of constitutional interpretation; besides, if there *is* executive power that has been found essential in other systems of government and is not granted the President in the more specific clauses of Article II, how is it to be

brought within the four corners of the Constitution except by recourse to the executive-power clause?

And is the President's executive power the *only* executive power known to the Constitution? This same clause seems to make an affirmative answer to this question logically imperative; but, if this is so, then what kind of power is that which Congress bestows by virtue of its power to make "all laws which shall be necessary and proper for carrying into execution" the powers of the national government? And what of the assumption that the President shall "take care that the laws be faithfully executed"—executed, that is, by *others*?

To complicate matters further, there is the fact that the diverse powers of the President are by no means of uniform quality, as to either reach or authoritativeness, when laid alongside the powers of Congress. By virtue of his power of veto and his duty to inform Congress as to the state of the Union the President himself participates in the legislative power. On the other hand, certain specifically granted executive powers or prerogatives, such as his power to pardon "offenses against the United States," his power to receive ambassadors, his power as Commander in Chief, are, when properly defined, theoretically autonomous and hence not subject to the legislative power.

Sources of the Framers' Ideas of Executive Power

The earliest American repositories of an executive power at all distinguishable as something other than a mere legislative agency were the governors of the royal provinces. This functionary, acting either independently or with a council, was customarily entrusted with the powers of appointment, military command, expenditure, and—within limitations—

pardon, as well as with large powers in connection with the process of lawmaking. At the same time, however, he was also the point of tangency with the British Crown, and so the point of friction between the imperial interest and the local interest, the latter being represented by the colonial assembly. Gradually the assemblies in most of the royal provinces, thanks especially to their control over supplies, were able to bring the governor under a large degree of legislative control and direction; and during the French and Indian War, when the governors were in constant need of money and of men for the forces, this development went forward by strides. The colonial period ended with the belief prevalent that the executive magistracy was the natural enemy, the legislative assembly the natural friend, of liberty —a sentiment strengthened by the contemporary spectacle of George III's domination of Parliament.

In most of the early state constitutions, accordingly, we find the gubernatorial office reduced almost to the dimensions of a symbol. In these instruments the governors were for the most part elective annually by the legislature, were stripped of every prerogative of their predecessors in relation to legislation—the right to convene the assembly, to prorogue it, to dissolve it, to veto its acts—and were forced to exercise even their more strictly executive functions subject to the advice of a council of state which was also elective by the legislature and, if the latter so desired, from its members. Several of these constitutions, to be sure, enunciate Montesquieu's doctrine of the Separation of Powers with considerable emphasis; but their actual application of the principle, when it was anything more than a caution against the same persons' holding office in more than one department at a time, was directed especially against the executive. In the language of Madison in *The Federalist:*

> The founders of our republics . . . seem never for a moment to have turned their eyes from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.[2]

Finally, in the Virginia constitution of 1776 it was stipulated, as if out of abundant caution, that "the executive powers of government" were to be exercised "according to the laws" of the commonwealth, and that no power or prerogative was ever to be claimed "by virtue of any law, statute, or custom of England." Executive power, in short, was left to legislative definition and was cut off entirely from the resources of the common law and of English constitutional usage.

But while the above is a just characterization of the majority of the Revolutionary state constitutions, there were exceptions in which a more generous conception of the executive office is at least foreshadowed. For example, as is pointed out by Hamilton in *The Federalist*,[3] the New York constitution of 1777 suggested not a few of the outstanding features of the presidency. The New York governor was not a creature of the legislature but was directly elective by the people; his term was three years, and he was indefinitely reeligible; except in the matter of appointments and vetoes, he was untroubled by a council; he bore the designation of Commander in Chief, possessed the pardoning power, and was charged with the duty of "taking care that the laws are faithfully executed to the best of his ability." The first effective gubernatorial veto, however, was that set up in the Massachusetts constitution of 1780, and the designation

[2] *The Federalist*, #48.
[3] *Ibid.*, #69.

"President" occurred in several of the state constitutions of that date.

Furthermore, the early state constitutions were by no means the only source, or even the chief source, on which the framers of the Constitution were able to draw in shaping their ideas of executive power. Locke, Montesquieu, and Blackstone were the common reading of them all, and in the pages of these writers executive power is delineated in no suspicious or grudging terms. Especially illuminating in this connection is Locke's description of "Prerogative" in the Fourteenth Chapter of his famous *Treatise:*

> Where the legislative and executive power are in distinct hands, as they are in all moderated monarchies and well-framed governments, there the good of the society requires that several things should be left to the discretion of him that has the executive power. For the legislators not being able to foresee and provide by laws for all that may be useful to the community, the executor of the laws, having the power in his hands, has by the common law of Nature a right to make use of it for the good of the society, in many cases where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it; nay, many things there are which the law can by no means provide for, and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require; nay, it is fit that the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of Nature and government—viz., that as much as may be all the members of the society are to be preserved. . . .[4]

Designating then "this power to act according to discretion for the public good, without the prescription of the law and sometimes even against it," as "prerogative," Locke continues:

> This power, whilst employed for the benefit of the community and suitably to the trust and ends of the government, . . . never is

[4] *Two Treatises on Government* (Morley, ed.), Book II, Chapter 14.

questioned. For the people are very seldom or never scrupulous or nice in the point or question of prerogative whilst it is in any tolerable degree employed for the use it was meant—that is, the good of the people, and not manifestly against it. . . .

And therefore he that will look into the history of England will find that prerogative was always largest in the hands of our wisest and best princes, because the people observing the whole tendency of their actions to be the public good, or if any human frailty or mistake (for princes are but men, made as others) appeared in some small declinations from that end; yet it was visible the main of their conduct tended to nothing but the care of the public. The people, therefore, finding reason to be satisfied with these princes, whenever they acted without, or contrary to the letter of the law, acquiesced in what they did, and without the least complaint, let them enlarge their prerogative as they pleased, judging rightly that they did nothing herein to the prejudice of their laws, since they acted conformable to the foundation and end of all laws—the public good. . . .

Most readers come upon these passages for the first time with considerable astonishment and wonder how the views they express are to be harmonized with the doctrine advanced in the same pages that in a free commonwealth the "legislative is not only the supreme power," but is "sacred and unalterable in the hands where the community have once placed it." The probability is that Locke, himself a professed empiricist, was quite untroubled by the seeming inconsistency. Moreover, this particular inconsistency was not of his contrivance. For while the Glorious Revolution, which Locke wrote primarily to justify, had settled it that the King would be henceforth dependent on Parliament for supplies, it had at the same time left him an unlimited veto wherewith to protect his other prerogatives against Parliament. What Locke gives us in the final analysis is then, *not* legislative supremacy really, but—as his Whig commentators pointed out—"a balanced constitution."

And a balanced constitution is also what "the celebrated Montesquieu" had in mind when, following a hint of Locke's,

he revived Aristotle's doctrine that government comprises three intrinsically distinct elements and reshaped it for the uses of eighteenth-century libertarianism. In a passage that the framers of the Constitution regarded as embodying the greatest discovery of political science since the time of Adam, Montesquieu wrote:

> In every government there are three sorts of power: the legislative; the executive in respect of things dependent on the law of nations; and the executive in regard to matters that depend on the civil law. . . .
>
> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, and execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.[5]

The doctrine of the Separation of Powers comprises one of the two great structural principles of the American constitutional system, the other being the doctrine of Dual Federalism. From it certain other ideas follow fairly logically: first, that the three functions of government are reciprocally limiting; secondly, that each department should be able to defend its characteristic functions from intrusion by either of the other departments; thirdly, that none of the departments may abdicate its powers to either of the others. The first two of these ideas reinforce executive power, particularly as against the principle of legislative supremacy; the last one operates the other way, and—significantly—it has today

[5] *The Spirit of the Laws* (Nugent-Prichart, ed.), Book XI, Chapter 3.

almost completely disappeared as a viable principle of American constitutional law.

Lastly, many of the framers had also read Blackstone, another exponent of the balanced constitution. In the *Commentaries* Parliament's power is depicted in terms most sweeping: "It can . . . do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament. True it is, that what Parliament doth, no authority upon earth can undo." [6]

Likewise the subordination of the King to the law is constantly insisted on. That, nevertheless, the law in question comprised a good deal more than acts of Parliament is amply apparent from the sweeping description given of the royal prerogative, especially in the joint fields of diplomacy and military command.[7]

In a word, the blended picture of executive power that is derivable from the pages of Locke, Montesquieu, and Blackstone is of a broadly discretionary, residual power available when other governmental powers fail; capable of setting bounds to some indefinite extent even to the supreme legislative power; and one which, in defense of these bounds, embraces an absolute veto on legislation. How far did this picture prevail with the framers?

The Philadelphia Convention and The Federalist

In the problem of "a national executive"—the phrase used by the authors of the Virginia Plan—the Philadelphia Convention was faced with a difficult dilemma. The majority

[6] *Commentaries,* I, Chapter 2, 161.
[7] *Ibid.,* 154–55.

of the framers ardently desired to provide an executive power that should be capable of penetrating to the remotest parts of the Union, not only to enforce the national laws, but also—a lesson from Shays's Rebellion—to bring assistance to the states in grave domestic disorders. At the same time most of them recognized that it was absolutely indispensable that the Convention avoid arousing the widespread fear of monarchy, which indeed some of the members shared. Nor did the vast size of the country and the difficulties of travel and transportation make the problem easier of solution. How could a political force be provided that would be sufficient to overcome these natural obstacles and yet be safe—or at least be *thought* safe—for liberty?

Of those who would fain have carried over into the projected national constitution the conception of executive power that predominated in the state consitutions the outstanding representative was Sherman of Connecticut. In the words of Madison's *Notes:*

> Mr. Sherman said he considered the Executive magistracy as nothing more than an institution for carrying the will of the legislature into effect, and that the person or persons ought to be appointed by and accountable to the legislature only, which was the depository of the supreme will of the Society. They were the best judges of the business which ought to be done by the Executive department, and consequently of the number necessary from time to time for doing it. He wished that the number might not be fixed, but that the legislature should be at liberty to appoint one or more as experience might dictate.[8]

Had this conception prevailed, the Convention would have anticipated the collegiate executive of the present Swiss Federation.

The leader of the strong-executive party was James Wilson of Pennsylvania. He "preferred," Madison records,

[8] Max Farrand, *Records of the Federal Convention* (New Haven, 1911), I, 65.

"a single magistrate, as giving most energy, dispatch, and responsibility to the office." He was also for rendering the Executive independent of the legislature, and to this end proposed that he be elected by the people at large and be vested with an absolute negative upon acts of the legislature. "Without such a defense," said he of the latter proposal, "the legislature can at any moment sink it [the executive] into non-existence."[9]

As chairman of the Convention's Committee of Detail, Wilson had the opportunity to incorporate his conception of the executive office in the preliminary draft of the Constitution. In Articles VI and X of the committee's report of August 6 the issue between a single and a plural Executive was settled in favor of the former; the idea was adopted of assuring the Executive his principal powers by definite constitutional grant instead of leaving them contingent on legislation; and the Executive was armed, in protection of the powers thus committed to him, with a qualified veto upon all legislation. Not till the close of the Convention, however, was the last of a persistent and constantly renewed series of efforts to load the President with a council finally defeated; and it was also at this late date that he was made a party to the treaty-making power and the power to appoint justices of the Supreme Court and ambassadors, both of which functions had been at first lodged in the Senate alone. Little wonder that the Senate has from the first assumed, from time to time, the role of jealous and zealous critic of the President!

Lastly, from the Convention's Committee on Style, of which Gouverneur Morris, another exponent of strong executive power, was chairman, came the present form of

[9] *Ibid.*, 65, 68–69, 98. See also Charles C. Thach, *The Creation of the Presidency* (Baltimore, 1922), Chapters 3–5.

the opening clause of Article II. The corresponding clause from the Committee of Detail had read as follows: "The executive power shall be vested in a single person. His style shall be 'the president of the United States' and his title shall be 'His Excellency' "—phraseology that designates the presidential office, but is less readily interpretable as a grant of power. Curiously enough, the present form of the clause was never separately acted on by the Convention.

But the problem of executive independence also involved, it was generally conceded, the problem of providing a mode for the President's election that would not bring him under the domination of the legislature; and on no other problem did the Convention expend more time and effort. In the Virginia Plan it was proposed that Congress elect the Executive and that he, or they, be ineligible for a second term. The New Jersey Plan likewise provided for election by Congress. Another proposal, which first appeared in Hamilton's Plan, was indirect election by electors chosen *ad hoc,* and without stipulation regarding presidential re-eligibility. A third suggestion was Wilson's for popular election, again without restriction as to re-eligibility.

When the question was taken up by the Convention in Committee of the Whole on July 17, popular election received the vote of only Pennsylvania; and shortly afterward choice by electors was also rejected. Thereupon election by the legislature was voted unanimously, only to be upset two days later in favor of election by electors, who were to be chosen by the state legislatures. What were the considerations that brought about this *volte-face*? Some at least of them were set forth at the time by Gouverneur Morris:

> It is necessary to take into one view all that relates to the establishment of the executive; on the due formation of which must depend the efficacy and utility of the Union among the present and future States. It has been a maxim in political science that Republican Government

is not adapted to a large extent of Country, because the energy of the Executive Magistracy cannot reach the extreme parts of it. Our Country is an extensive one. We must either then renounce the blessings of the Union, or provide an Executive with sufficient vigor to pervade every part of it. . . . One great object of the Executive is to control the Legislature. The Legislature will continually seek to aggrandise & perpetuate themselves; and will seize those critical moments produced by war, invasion or convulsion for that purpose. It is necessary then that the Executive Magistrate should be the guardian of the people, even of the lower classes, agst Legislative tyranny, against the Great & the wealthy who in the course of things will necessarily compose the Legislative body. . . . If he is to be the Guardian of the people let him be appointed by the people. If he is to be a check on the Legislature let him not be impeachable. Let him be of short duration, that he may with propriety be re-eligible. . . .[10]

Five days later (July 24) election by the legislature was voted again, a vote adhered to on July 26. And so matters stood till almost the end of the Convention, when the question was handed over to a Committee on Remaining Matters, which, with Morris as chairman, recommended the substance of the present method of election. There can be no doubt that the motive that chiefly influenced the Convention to make this important change at the last moment was to secure the President's re-eligibility, and apparently his indefinite re-eligibility, without at the same time subjecting him to the temptation of courting legislative favor. To be sure, popular election too would have done this; but the electoral method had the additional advantage that it left each state free to determine its own rule of suffrage without sacrificing its due weight in the choice of a President. It was this consideration, urged particularly by Madison, that turned the scale against the more democratic method. It was not, however, the only argument offered against it.

The people were liable to deceptions; the people in large areas were too ignorant of the characters of men;

[10] Farrand, *op. cit.*, II, 52–54.

elective monarchies were turbulent and unhappy; the people would vote for their state candidates; the people would be led by a few active and designing men and would not be better able to judge than the legislature; "it were as unnatural to refer the choice of a proper character for chief magistrate to the people, as it would be to refer a trial of colours to a blind man"—so it was argued. Electors, on the contrary, would be men of special discernment into the qualities demanded by the office of President and would be capable of viewing the national scene as a whole; and, since they were both a numerous and a transitory body, the choice of them would not excite the community in the way that the direct election of "the final object of the public wishes" would.[11]

The creation of the so-called Electoral College marked the Convention's definite rejection of the notion of legislative supremacy in favor of the notion of a balanced constitution. Did it concede too much to the Executive? The charge that it did had to be met by supporters of the Constitution. As Hamilton wrote in *The Federalist:*

> Here the writers against the Constitution seem to have taken pains to signalize their talent of misrepresentation. Calculating upon the aversion of the people to monarchy, they have endeavored to enlist all their jealousies and misapprehensions in opposition to the intended President of the United States. . . . He has been decorated with attributes superior in dignity and splendor to those of the King of Great Britain. He has been shown to us with the diadem sparkling on his brow and the imperial purple flowing in his train. He has been seated on a throne surrounded with minions and mistresses, giving audience to the envoys of foreign potentates, in all the supercilious pomp of majesty. The images of Asiatic despotism and voluptuousness have scarcely been wanting to crowd the exaggerated scene. We have been taught to tremble at the terrific visages of murdering janizaries and to blush at the unveiled mysteries of a seraglio.[12]

[11] *Ibid.*, 29–32.
[12] *The Federalist,* #67.

Hamilton endeavored to allay these apprehensions, real or pretended, by pointing out how much the country had suffered under the Articles of Confederation, as well as under the state constitutions, from lack of adequate executive power. "Energy in the executive," he wrote, "is a leading character in the definition of good government"; and of "the ingredients which constitute energy in the executive" the first is "unity," as it is also of responsibility; and he voiced agreement with Delolme's contention that

> The executive power is more easily confined when it is ONE; that it is far more safe there should be a single object for the jealousy and watchfulness of the people, and, in a word, that all multiplication of the Executive is rather dangerous than friendly to liberty.[13]

For the rest, Hamilton discharged the duties of advocacy by pointing out that if the President was beyond the menaces of Congress, so also was Congress beyond the President's power to corrupt; by emphasizing the participation of the Senate in some of the most important powers of the President, among which he included the removal power for officers appointed with the Senate's consent; by emphasizing Congress's control of the purse; and, lastly, by dwelling on the mode of election by a temporary agency called into existence for the occasion and hence not under presidential influence. The role of the President as the leader of a national party was beyond the prevision of either Hamilton or the opponents of the Constitution. Having disposed of corruption, they had, forsooth, forestalled parties!

The Presidency from Washington to the Second Adams

Of the three departments of the national government the Supreme Court, as representing the judiciary, has been

[13] *Ibid.*, #70.

the most uniformly successful until recent years in establishing its own conception of its authority and functions, the President next, Congress the least successful. Judicial review has been, in fact, of somewhat minor importance in determining the scope of presidential powers. Though the Court has sometimes rebuffed presidential pretensions, it has more often labored to rationalize them; but most of all it has sought on one pretext or other to keep its sickle out of this "dread field." This policy may be owing partly to the fact that the President has "the power of the sword"—that is, immediate command of the physical forces of government; and partly to the related fact that while the Court can usually assert itself successfully against Congress by merely disallowing its acts, presidential exercises of power will generally have produced some change in the external world beyond ordinary judicial competence to efface. Moreover, the same course of reasoning on which executive power as conferred by the opening clause of Article II has thriven is also favorable to the pretensions of the bearers of judicial power under Article III. In supporting "executive power" against Congress the Court may very well be fighting its own battle for "judicial power."[14]

The presidency got off to a good start under a very great man. The principle of the Separation of Powers was not yet regarded as forbidding the Executive to initiate legislation. In the act establishing the Department of State, Congress itself laid down a practical construction of the Constitution that, save for the interregnum of the Reconstruction period, has left the President absolute master of his official family. A dangerous foreign situation in 1793 brought that family into existence, and it also enabled the President to translate his position as the organ of communication with other gov-

[14] *See* Kansas *v.* Colorado, 206, U. S. 46, 81–82 (1906).

ernments into a substantive creative power. Finally, the Whiskey Rebellion provided the occasion for the first step in that course of legislation and of presidential action that has long since clothed the President, in situations of widespread disorder or threat of disorder, with powers akin to those of dictatorship.

Under Jefferson and the "Virginia School of Presidents" a certain retrogression took place from the notion of presidential autonomy toward that of legislative supremacy. Under Jefferson himself the retreat was theoretical rather than actual. As the founder and leader of the first national party, Jefferson was able to dominate Congress by personal influence, and it was shown for the first time what accession of strength political management can bring to the presidency. But Jefferson's successors, caught between the upper and nether millstones of their self-abasing conception of the presidency and their lack of personal force, were reduced to official insignificance. The War of 1812 marked the near elimination for the time being of presidential prerogative in the field of foreign relations; the Monroe Doctrine announced to the world at large that opportunities for aggrandizing the presidency through foreign adventuring were to be confined to the Western Hemisphere. Jefferson himself pronounced the dictum that no President could with safety to our democratic institutions be eligible for a third term, albeit he might nominate his successor; and the successors whom Jefferson nominated ratified the ban.

Jackson's presidency was more than a reversion to earlier ideas: it was a revolution. A new electorate was organized into a new party whose wide ramifications, focusing in the National Convention, rendered its continuance independent of accidents of personality. Guaranteed this power and persistent support among the people at large, Jackson extended

the doctrine of the President's autonomy to embrace his obligation to the law; constitutional obligation was reduced —or exalted—to the level of moral obligation. At the same time the President's duty to "take care that the laws be faithfully executed" was asserted to comprise the right to read the law for any and every member of the executive department; and through a vigorous and expanded use of his veto and removal powers Jackson for the time being made this claim good. Through the latter power, moreover, the spoils system was for the first time engrafted on the national government, thereby adding one more weapon to the presidential armory.

Except, nevertheless, for a few unfortunates like John C. Calhoun and Nicholas Biddle, the Jacksonian "dictatorship" was more bark than bite, more proclamation than performance. The Monroe Doctrine, the taboo on a third term, and, what was even more important, the States Rights conception of national legislative power, all set conspicuous landmarks that Jackson himself had not the slightest inclination to disturb. His most outstanding assertions of power, and especially in the field of legislation, were negative and exercised by veto. Moreover, despite the permanency of the party organization reared by his henchmen in every quarter of the Union, the prominence of the office during his incumbency was predominantly a reflection of his own energetic personality. When he left office he left behind him a political vacuum that a resuscitated Congress presently filled and, thanks to the manipulations of the slavery interest, continued to fill till the outbreak of the Civil War.

For all that, the Jacksonian conception of the presidency was not forgotten. Indeed, its critics contributed more than its champions to advertise it, with no friendly intention, to be sure. "I look upon Jackson," Kent wrote Story early in

1834, "as a detestable, ignorant, reckless, vain and malignant tyrant. . . . This American elective monarchy frightens me. The experiment, with its foundations laid on universal suffrage and our unfettered press, is of too violent a nature for our excitable people." "The President," thundered Webster in the Senate, "carries on the government; all the rest are sub-contractors. . . . A Briareus sits in the centre of our system, and with his hundred hands touches everything, controls everything." "We are in the midst of a revolution," lamented Clay, "hitherto bloodless, but tending rapidly towards a total change of the pure republican character of the Government, and to the concentration of all power in the hands of one man." [15]

Indeed, the framers of the Constitution themselves did not escape censure for this state of things, as we discover when we turn to Abel Upshur's essay on *Federal Government,* which appeared in 1840. Dealing with the presidency, Upshur wrote:

> The most defective part of the Constitution beyond all question, is that which relates to the Executive Department. It is impossible to read that instrument, without being struck with the loose and unguarded terms in which the powers and duties of the President are pointed out. So far as the legislature is concerned, the limitations of the Constitution, are, perhaps, as precise and strict as they could safely have been made; but in regard to the Executive, the Convention appears to have studiously selected such loose and general expressions, as would enable the President, by implication and construction either to neglect his duties or to enlarge his powers. We have heard it gravely asserted in Congress that whatever power is neither legislative nor judiciary, is of course executive, and, as such, belongs to the President under the Constitution. . . .[16]

In 1848 the Swiss people framed a new constitution; but

[15] W. E. Binkley, *President and Congress* (1947), 80, 84; Beveridge, *John Marshall,* IV, 535 *n.*

[16] *A Brief Inquiry,* etc. (1840), 116–17.

although they imitated our national Constitution in several other respects, they steered conspicuously clear of the presidency because they felt it to be favorable to dictatorship.

The last important contribution to the theory of the presidency until the turn of the century was Lincoln's, whose ultimate conception of the office was as much an expression of temperament as Jackson's. A solitary genius who valued the opportunity for reflection above that for counsel, Lincoln came to regard Congress as a more or less necessary nuisance and the Cabinet as a usually unnecessary one. Nor could it have escaped Lincoln's intuition—especially after Buchanan's Message of December 3, 1860—that, if the Union was to be saved, recourse must be had to some still untested source of national power, one that had not become entangled, as had Congress's, in the strangulating sophistries of States Rights. So, for a double reason, Lincoln turned to the Commander-in-Chief clause, from which, reading it in conjunction with the "shall-take-care" clause, he drew the conclusion that the war power was his. Originally, it is true, he appears to have assumed that his power was a simple emergency power whose *ad interim* decisions Congress must ratify if they were to be permanently valid. But as the problems of Emancipation and then of Reconstruction loomed he shifted ground, and his final position was, as Professor Randall phrases it, "that as President he had extraordinary legal resources which Congress lacked." [17] The practical fruitage of this theory, joined with Locke's conception of Prerogative, is treated at length in the following chapter.

But, though Lincoln's invocation of the war power added a vast new dimension to the presidency in the presence of national emergency, his incumbency was in certain other

[17] J. G. Randall, *Constitutional Problems Under Lincoln* (1926), 514.

respects a misfortune for the office. His frontiersman's conceptions of the requirements of sound administration were no less naive than Jackson's, whose record as a spoilsman he far surpassed; and except for an ineffectual endeavor to interest Congress in the subject of compensated emancipation, he left the task of procuring necessary legislation to his Cabinet secretaries, and especially to Chase and Stanton, theirs being the departments most concerned. The outcome in connection with Stanton was the creation of a direct relationship between the War Department and the congressional Committee on the Conduct of the War—a relationship that under Johnson brought the presidency to the verge of disaster.

The Presidency Occulted—Congress Dominant

The schism between the President and Congress that nearly cost Johnson his official life was, in fact, well under way before he became President. The subject of controversy was the right to determine the conditions on which the seceding states should be restored to their normal position in the Union. Lincoln professed to regard the war power, supplemented by the pardoning power, as the constitutionally designated agency for this important task, whereas the Republican leadership in Congress proclaimed the paramountcy of the national legislative power, their reliance being on the guarantee by the United States, in Article IV, section 4, of "a republican form of government" to the states. The President's duty, Lincoln was warned in the Wade-Davis Manifesto of August 5, 1864, was "to obey and execute, not to make the laws . . . to suppress by arms armed rebellion and leave political organization to Congress"; and two years later the same warning was addressed to Johnson by Thaddeus Stevens in blunter terms:

> He [the President] is the servant of the people as they shall speak through Congress. . . . Andrew Johnson must learn that he is your servant and that as Congress shall order he must obey. There is no escape from it. God forbid that he should have one tittle of power except what he derives through Congress and the Constitution.[18]

Johnson spurned the admonition. An obstinate, ill-educated man, he took his constitutional beliefs with intense seriousness, and points that his predecessor would have yielded with few compunctions for a workable plan, he defended as though they had been transmitted from Sinai. Few Presidents have surpassed Johnson in the exorbitance of his pretensions for the office, none in his inability to make them good.

Final appraisement of Johnson's incumbency in its bearing on the theory of the Presidency is, nevertheless, not so easy. Johnson escaped dismissal from office by the High Court of Impeachment by a single vote, but he *escaped!* What is more, it was during his administration that the Supreme Court confessed, in Mississippi v. Johnson,[19] its inability to enjoin a President from exceeding his constitutional powers or to order him to perform his constitutional duties. The principle that Marshall had stated as applicable to the President's "important political powers," that "in their exercise he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience," was thus extended to the President's duty to enforce the law. Furthermore, whatever of popular glamour the office had lost under Johnson was restored when "the man from Appomattox and its famous apple tree" became President; so much so in fact that the gross scandals that marred Grant's two terms in office did not prevent his becoming in 1880 the beneficiary of a formidable third-term movement—the first in our history.

[18] Binkley, *op. cit.*, 136.
[19] 4 Wall. 475 (1867).

Reflecting on all of which, Henry C. Lockwood, in *The Abolition of the Presidency,* which appeared in 1884, advanced the thesis that only by replacing the President with an executive council after the Swiss model could American liberty be preserved. He wrote:

> The tendency of all people is to elevate a single person to the position of ruler. The idea is simple. It appeals to all orders of intellects. It can be understood by all. Around this centre all nationality and patriotism are grouped. A nation comes to know the characteristics and nature of an individual. It learns to believe in the man. Certain contingencies are likely to take place. It does not require a great amount of political knowledge to form an opinion as to the course of their favorite statesman, whose character they have studied. Under these circumstances, let a person be chosen to an office, with power conferred upon it equal to that of the Presidency of the United States, and it will make but little difference whether the law actually gives him the right to act in a particular direction or not. He determines a policy. He acts. No argument that the law has been violated will avail. He is the chief officer of the nation. . . . The sentiment of hero worship, which to a great extent prevails among the American people, will endorse him. Under our form of government, we do not think so much of what Congress may do. A great multitude declared: "Give us President Grant! We know him. He is strong! He will rule!"[20]

Lockwood's re-echo of Locke was an anachronism, coming at once too late and too early. Its untimeliness appears most strikingly when we set against it the youthful Woodrow Wilson's *Congressional Government,* which issued from the press the year following. In this revised student thesis we encounter the pioneer attempt to give a nonlegalistic, factual description of the reciprocal roles of Congress and the President, and it is evident that the young Virginian writing with Reconstruction a recent memory, regarded Congress as having become decidedly the dominant member in the partnership. I quote some characteristic passages from the Introduction:

> The noble charter of fundamental law given us by the Convention of 1787 is still our Constitution; but it is now our *form of government*

[20] *The Abolition of the Presidency,* 191–92.

rather in name than in reality, the form of the Constitution being one of nicely adjusted, ideal balances, whilst the actual form of our present government is simply a scheme of congressional supremacy. . . .

It is said that there is no single or central force in our federal scheme . . . but only a balance of powers and a nice adjustment of interactive checks, as all the books say. How is it, however, in the practical conduct of the federal government? In that, unquestionably, the predominant and controlling force, the center and source of all motive and of all regulative power, is Congress. . . .

Congress [is] the dominant, nay, the irresistible, power of the federal system, relegating some of the chief balances of the Constitution to an insignificant role in the 'literary theory' of our institutions. . . .[21]

And again:

Congress is fast becoming the governing body of the nation, and yet the only power which it possesses in perfection is the power which is but a part of government, the power of legislation.[22]

With which is to be contrasted the picture he sketches of the presidency at this period:

Except in so far as his power of veto constitutes him a part of the legislature, the President might, not inconveniently, be a permanent officer; the first official of a carefully-graded and impartially regulated civil service system, through whose sure series of merit-promotions the youngest clerk might rise even to the chief magistracy. He is part of the official rather than of the political machinery of the government, and his duties call rather for training than for constructive genius. If there can be found in the official systems of the States a lower grade of service in which men may be advantageously drilled for Presidential functions, so much the better. The States will have better governors, the Union better Presidents, and there will have been supplied one of the most serious needs left unsupplied by the Constitution—the need for a proper school in which to rear federal administrators.[23]

Young Wilson had an ax to grind—two axes, in fact. For himself he desired to emulate his mentor Walter Bagehot's attack on "the literary theory" of the British constitution with one of his own on "the literary theory" of the American Constitution; from a broader point of view he wished to see

[21] *Congressional Government*, 6, 11, 23.
[22] *Ibid.*, 301.
[23] *Ibid.*, 254.

the British cabinet system adapted to the American Constitution; and this twofold bias led him to exaggerate the phenomenon he recorded.

The real herald of the twentieth-century presidency, however, its John the Baptist, was not Woodrow Wilson: it was Henry Jones Ford, whose brilliant volume *The Rise and Growth of American Politics,* published in 1898, spotlights the presidency in the tradition of its successes, not of its failures. In these discerning pages we read:

> The agency of the presidential office has been such a master force in shaping public policy that to give a detailed account of it would be equivalent to writing the political history of the United States. From Jackson's time to the present day it may be said that political issues have been decided by executive policy. . . .
>
> While all that a President can certainly accomplish is to force a submission of an issue to the people, yet such is the strength of the office that, if he makes a sincere and resolute use of its resources, at the same time cherishing his party connection, he can as a rule carry his party with him, because of the powerful interests which impel it to occupy ground taken for it by the administration. . . .
>
> On the other hand, unless a measure is made an administrative issue, Congress is unable to make it a party issue. . . .
>
> The rise of presidential authority cannot be accounted for by the intention of presidents; it is the product of political conditions which dominate all the departments of government, so that Congress itself shows an unconscious disposition to aggrandize the presidential office. . . .
>
> The truth is that in the presidential office, as it has been constituted since Jackson's time, American democracy has revived the oldest political institution of the race, the elective kingship. It is all there: the precognition of the notables and the tumultuous choice of the freemen, only conformed to modern conditions. That the people have been able to accomplish this with such defective apparatus, and have been able to make good a principle which no other people have been able to reconcile with the safety of the state, indicates the highest degree of constitutional morality yet attained by any race.[24]

There is, to be sure, some exaggeration here. It is quite untrue that after Jackson's day political issues had been settled by executive policy. The issue of slavery in the territories

[24] *The Rise and Growth of American Politics,* 279–93 *passim.*

first arose in Congress and was settled—temporarily to be sure—by the Supreme Court, eventually by war; and the issue of Reconstruction, as well as that of the tariff, was settled in Congress. But Ford's notable volume was really oriented toward the future, and the future came to its rescue.

The first exponent of the new presidency was Theodore Roosevelt. Assessing his performance in the illumination sparked by Ford's volume and the Spanish-American War,[25] Woodrow Wilson wrote in his Blumenthal Lectures, given at Columbia University in 1907:

> He cannot escape being the leader of his party except by incapacity and lack of personal force, because he is at once the choice of the party and of the nation.
>
> He can dominate his party by being spokesman for the real sentiment and purpose of the country, by giving direction to opinion, by giving the country at once the information and the statements of policy which will enable it to form its judgments alike of parties and of men.
>
> His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people.
>
> He may be both the leader of his party and the leader of the nation, or he may be one or the other. If he lead the nation, his party can hardly resist him. His office is anything he has the sagacity and force to make it.
>
> Some of our Presidents have deliberately held themselves off from using the full power they might legitimately have used, because of conscientious scruples, because they were more theorists than statesmen. . . . The President is at liberty, both in law and conscience, to be as big a man as he can.
>
> His is the vital place of action in the system, whether he accept it as such or not, and the office is the measure of the man—of his wisdom as well as of his force.[26]

[25] *See Congressional Government* (18th impression), xi–xii.

[26] Woodrow Wilson, *Constitutional Government in the United States* (Columbia, 1908), 67–73 *passim.*

The following year the lectures were published under the title *Constitutional Government in the United States.* The same year Wilson, as president of Princeton University, offered its author a professorship in politics, which the latter in due course accepted. His indebtedness to Roosevelt Mr. Wilson was less prompt to acknowledge. In the index to *Constitutional Government* T.R's name appears just once, and the reference is of no significance. Indeed, without mentioning Roosevelt, who had just emerged victorious from a hard fought battle with the Senate over certain pending legislation, Wilson contrives to read him a lecture on how Presidents ought to treat that august body. "If," he writes, "he [the President] has character, modesty, devotion and insight as well as force, he can bring the contending elements into a great and efficient body of common counsel."[27] Little did he foresee that ten years later he would be describing the Senate as "the only legislative body in the world which cannot act when its majority is ready for action. A little group of willful men, representing no opinion but their own, have rendered the great government of the United States helpless and contemptible"![28]

Further particulars of the emergence of the presidency in these latter days, under the double stimulation of crisis and an enlarged conception of the role of government, especially of the national government, are dealt with in subsequent pages in their appropriate contexts.

Taken by and large, the history of the presidency is a history of aggrandizement, but the story is a highly discontinuous one. Of the thirty-three individuals who have filled

[27] *Ibid.*, 141.

[28] Franklin Burdette, *Filibustering in the Senate* (Princeton, 1940), 121.

the office not more than one in three has contributed to the development of its powers; under other incumbents things have either stood still or gone backward. That is to say, what the presidency is at any particular moment depends in important measure on who is President, as indeed Wilson had insisted in 1907, five years before he was given the opportunity to animate by his own practice the figure he had wrought in the academic atelier from the materials supplied by Ford's text and T.R.'s example. Yet the accumulated tradition of the office is also of vast importance. Precedents established by a forceful or politically successful personality in the office are available to less gifted successors, and permanently so because of the difficulty with which the Constitution is amended. Hence the rise and spread from the Jacksonian period onward of the doctrine of popular sovereignty operated very differently on the presidency and on the governorship in the states. In the latter there was for years a progressive splitting up of the executive power, accompanied by the transference of its component parts to elective officials over whose tenure and conduct the governor had no control. In the national government, on the contrary, the dogma of popular sovereignty has had to adapt itself to the comparative rigidity of the national Constitution; and this it has done by exalting and consolidating the power of the one national official who is, in a substantial sense, elective by the people as a whole. The claim set up by Jackson to be the People's Choice has been reiterated, in effect, by his successors many times, and with decisive results for the presidential role.[29]

[29] Prior to the Second World War Norman J. Small had written in his discerning volume, *Some Presidential Interpretations of the Presidency* (Baltimore, 1932), p. 198: "Nothing is more evident in the history of the Presidency than the steady accumulation of power by that office."

Chapter II

Of Presidential Prerogative

"PRESIDENTIAL PREROGATIVE" is a short term for power claimed by the President primarily on the basis of the Constitution itself. At any particular time it is the product of three factors: personality, crisis (i.e., public necessity as judged by the President), and available constitutional doctrine. In the course of the last half century expansion of the presidential role has been substantially continuous, thanks to a succession of strong Presidents, to our involvement in two world wars, to "an economic crisis more serious than war," to "a cold war" more baffling in some respects than "a shooting war," and to a succession of industrial strikes or threats of strikes. In what fashion, through what verbal apparatus, so to speak, has enlargement of the presidential role been articulated from time to time with the Constitutional document?

The Executive-Power Clause

The opening clause of Article II of the Constitution reads: "The Executive power shall be vested in a President of the United States of America." It is clear from the records of the Philadelphia Convention, as was noted earlier, that the primary purpose of this clause was to settle the question whether the executive branch should be plural or single, while a secondary purpose was to give the President a title. The term "executive power" denoted simply the powers con-

ferred upon him in the succeeding provisions of the Article—"The power, by and with the advice and consent of the Senate, to make treaties," the power to "receive Ambassadors and other public ministers," and so on. Yet the first Congress to assemble under the Constitution was compelled to choose between seeing the President stuck indefinitely with subordinates appointed "by and with the advice and consent of the Senate," and attributing to him on the score of his executive power the right to remove such officers at will. It chose the latter alternative, thereby ousting the Senate once and for all time from any share in the removal power.[1]

Likewise, in 1793 Hamilton invoked the executive-power clause in support of President Washington's proclamation of neutrality upon the outbreak of war between France and Great Britain. Three years earlier Jefferson had cited the clause, in an official opinion, for the proposition that "the transaction of business with foreign nations is Executive altogether," doctrine that John Marshall later reiterated on the floor of Congress: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."

Indeed, throughout the first decade under the Constitution aggrandizement of the President's role in the field of foreign relations was unremitting. In his reception of Genêt, Washington laid claim effectively to the power to recognize new governments, and by his subsequent demand on the French government that it recall its representative he established a precedent followed by later Presidents re-

[1] For the Supreme Court's ratification of the "decision of 1789" see Myers *v.* U. S., 272 U. S. 52 (1926). The ratification was somewhat too sweeping and had to be retracted as to the great independent agencies like the I.C.C., the F.T.C., etc., which are now held not to be in the executive department, but arms of the legislative department. Humphrey *v.* U. S., 295 U. S. 602 (1935).

peatedly, and more than once in the face of impending war. He also blocked the Senate in its effort to downgrade certain nominees to diplomatic posts, thereby establishing the principle that though that body may assent to or reject nominations by the President, it cannot remodel them. Likewise, he initiated what later became an established practice marking a serious inroad on the Senate's participation in the choice of diplomatic representatives, the designation of a personal agent to conduct negotiations abroad. Meantime the Senate itself had by its own headiness surrendered the right to advise in advance concerning the terms of international agreements.[2]

To all these developments the Court in due course lent its sanction, thereby laying the foundations of the doctrine of "political questions," which has many times afforded executive action an escape hatch from the trammels of judicial review, and especially in the field of foreign relations.[3]

Today, not only is the executive-power clause an ever-available recourse to the President in the field of foreign affairs: it is also an indeterminate factor of any and all presidential powers.

The Commander in Chief Clause

The second, and today the most powerful, timber in the constitutional rooftree of presidential prerogative is the clause that makes the President "Commander-in-Chief of the Army

[2] For particulars *see* Corwin, *The President, Office and Powers* (ed. of 1948), Chapter V and pp. 459–83; also Norman J. Small, *Some Presidential Interpretations of the Presidency* (Baltimore, 1932), Chapter II.

[3] Marbury *v.* Madison, Cr. 137, 166–67 (1803). Corwin, *The Constitution and What It Means Today* (11th ed., Princeton, 1954), 138 and note.

and Navy of the United States and of the Militia of the several States when called into the actual service of the United States." Hamilton, expounding this clause in *The Federalist,* asserted that it would be altogether erroneous to compare the power that it confers with the superficially similar prerogative of the British monarch. The President was top admiral and top general, and nobody could issue him a military command; but that was all. And in 1850, in a case growing out of the Mexican War, the Supreme Court, speaking by Chief Justice Taney, substantially repeated Hamilton's language.[4] The Comander in Chief clause remained the forgotten clause of the Constitution until the day when Sumter fell, April 14, 1861. Then came the great break-through.

Lincoln, first calling Congress to assemble on July 4, at the time more than ten weeks away, proceeded forthwith to take certain measures of his own, based on the idea that in the circumstances the war power was his; and on this premise he proclaimed a blockade of the Southern ports, summoned an army of 300,000 volunteers, increased the regular Army and Navy, took over the rail and telegraph lines between Washington and Baltimore and eventually as far as Boston, and suspended the writ of habeas corpus along these lines.

Several of these extraordinary measures Congress presently ratified; all save that touching habeas corpus were grounded on the theory that the Rebellion possessed from the outset the dimensions of public war, a theory that the Supreme Court underwrote in the Prize Cases of 1863.[5]

[4] *The Federalist* #69; Fleming *v.* Page, 9 How. 603, 615, 618.

[5] 2 Black. 635 (1863). The Emancipation Proclamation rests on the same assumption and hence raises no fresh question respecting the powers of the President as Commander in Chief. *See* James G. Randall, *Constitutional Problems Under Lincoln* (New York, 1926), Chapter XVI.

Lincoln's general suspension of the habeas corpus privilege as to persons arrested for alleged disloyal practices in September 1862 and his order that they be tried by military commission stemmed, however, from the notion that the entire country, and not merely the portion of it within the enemy's lines, constituted "a theatre of military operations," a conception that the Court rejected in 1866 in the famous Milligan Case. The war being now safely over, the Court could indulge its long pent-up constitutional scruples.[6]

Between the Civil War and the First World War two profound contrasts appear in retrospect. In the first place, most of the fighting in the latter—all the land fighting—took place three thousand miles from our shores. There was consequently no question at any time of treating the country at large as a "theatre of military operations" in the conventional sense of that term. In the second place, on the other hand, the vast development between the two wars of the technological aspects of warfare had created in this greatest of industrial nations an industrial theater of war of immense proportions. Great industry in the United States had, in brief, become part and parcel of the fighting forces not only of the United States but of its allies as well, and as such it had to be subjected to detailed regimentation by the government of the United States. To meet this requirement Congress was compelled to develop a new technique in legislative practice, one capable of meeting the fluctuating demands of a fluid war situation. This it did by delegating vast unchanneled powers to the President, to be exercised by him through men of his own choosing. John Locke's ban on delegated legislation simply went by the board, nor has it since been revived so far as concerns powers shared by the two departments. As to these "cognate powers," as it terms them, the Court will

[6] 4 Wall. 2.

not attempt today to plot nicely, or indeed at all, the delimiting line.[7] More than that, President Wilson took upon himself, without consulting Congress, both the government of industrial relations and the screening of information regarding the war, the former function being performed by the War Industries Board under Mr. Baruch, the latter by the Committee of Public Information headed by Mr. Creel. Both agencies were created out of hand by the President.

The Second World War was the First World War writ large, and the quasi-legislative powers of Franklin Roosevelt as "Commander-in-Chief in wartime," to use his own favorite formula, burgeoned correspondingly. The precedents were there, to be sure, most of them from the First World War, but they proliferated amazingly. What is more, Roosevelt took his first step toward war some fifteen months before our entrance into "shooting war." This step occurred in September 1940, when he handed over fifty so-called "overage" destroyers to Great Britain. The truth is, they were not overage, but had been recently reconditioned and recommissioned. The late Robert H. Jackson, subsequently a member of the Supreme Court, duly wrote the required opinion of justification. It boiled down in effect to this: Since everybody admits that the President can, as Commander in Chief, *dispose* the forces of the United States, why then may he not *dispose of* them? Actually, what President Roosevelt did was to take over for the nonce Congress's power to dispose of property of the United States (Article IV, Section 3) and to repeal at least two statutes.[8]

Congress's endorsement was not long delayed, however,

[7] United States *v.* Curtiss-Wright Export Corp., 299 U. S. 304, 320–27 (1936).

[8] For particulars *see* the writer's communication to the *New York Times*, October 13, 1940.

and it was given in ungrudging terms. The Lend-Lease Act of March 11, 1941 empowered the President, whenever he deemed it to be in the interest of the national defense, to authorize the Secretary of War, the Secretary of the Navy, or any other head of department or agency of the government to manufacture or "otherwise procure," so long as funds were available, "defense articles"—i.e., anything from butter to battleships—and "sell, transfer, exchange, lease, lend or otherwise dispose of the same to any government whose defense the President deemed vital" to that of the United States, and on any terms that he deemed "satisfactory." First and last the United States underwrote under this authorization the defense of its allies to the tune of $40,000,000,000 including a destroyer to the Queen of Holland, then an exile in England!

Lend-Lease marks a climax in the development of the technique of delegating legislative power to the President. At the same time, however, it is also featured by a new device calculated to minimize one danger of this type of legislative procedure: the retention by the President of the powers delegated to him after Congress desires to put an end to them. Thus the act was to run for certain stipulated periods, unless the houses should meanwhile by concurrent resolution revoke it. In an article in the *Harvard Law Review* for June 1953 the late Justice Jackson revealed that Roosevelt was strongly inclined to protest against this feature of the act as invasive of his power of veto and hence unconstitutional, but withheld his hand for fear he might not get the act at all. One can only be touched by this anxiety of Mr. Roosevelt to preserve the Constitution, but his scruples appear to have been uncalled for. There is no reason why, when Congress delegates power to the President, or to any-

body else, it may not attach such condition of limitation. To contend otherwise is to affront common sense.

As mentioned already, President Wilson, without troubling Congress, created two important administrative agencies in the First World War. Vastly more impressive was Mr. Roosevelt's performance a quarter of a century later. In April 1942 the writer requested the Executive Office of the President to furnish a list of all the war agencies and to specify the supposed legal warrant by which they had been brought into existence. A detailed answer was returned that listed forty-three executive agencies, of which thirty-five were admitted to be of purely executive provenience. Six of these raised no question, for all they amounted to was an assignment by the President of additional duties to already existing officers and to officers most of whose appointments had been ratified by the Senate. Thus our participation in the Combined Chiefs of Staff became an additional duty of certain military and naval commanders, and the Combined Raw Materials Board was a similar creation. Nobody was assigned to such duties who was not already in an office to which the duties were properly referable. But the Board of Economic Warfare, the National Housing Agency, the National War Labor Board, the Office of Censorship, the Office of Civilian Defense, the Office of Defense Transportation, the Office of Facts and Figures and the Office of War Information, the War Production Board (which superseded the earlier Office of Production Management), the War Manpower Commission, and later on the Economic Stabilization Board—all these were created by the President by virtue of the "aggregate of powers" vested in him "by the Constitution and the statutes"—a quite baffling formula, also the invention of Mr. Jackson.

The President Governs Labor Relations[9]

On June 7, 1941, six months before the Japanese descended on Pearl Harbor, Mr. Roosevelt, citing his proclamation thirteen days earlier of an "unlimited national emergency," issued an executive order seizing the North American Aviation plant at Inglewood, California, where, on account of a strike, production was at a standstill. Attorney General Jackson justified the seizure, the forerunner of many similar assertions of presidential prerogative, as growing out of the "duty constitutionally and inherently resting upon the President to exert his civil and military as well as his moral authority to keep the defense efforts of the United States a going concern" and "to obtain supplies for which Congress has appropriated money, and which it has directed the President to obtain." On a like justification the Federal Shipbuilding and Dry Dock Company at Kearney, New Jersey, was taken over and operated by the Navy from August 23, 1941 to January 5, 1942, and the plant of the Air Associates, Incorporated, at Bendix, New Jersey, placed under Army control from October 30, 1941 to December 27, 1941. Then from the creation of the War Labor Board on January 12, 1942 to the enactment of the War Labor Disputes Act, June 25, 1943, Mr. Roosevelt ordered the taking over of the plants of four other concerns, one of them the Brewster Aeronautical Corporation, the seizure of which was put on the ground of its "inefficient management"; another was the Toledo, Peoria and Western Railroad, which was destined to remain under the control of the Office of Defense Transportation (ODT) nearly three years and a half.

[9] On this section *see The President, Office and Powers,* pp. 297–302 and accompanying notes.

Again Wilsonian precedents from the First World War pointed the way, except that Mr. Wilson confined his similar activities to the period of hostilities. Also it was from Wilsonian precedents that the Roosevelt administration borrowed the idea of what have been variously termed "administrative sanctions," "indirect sanctions," and simply "sanctions." The following episode involving the Remington Arms Company of Bridgeport, Connecticut, in the fall of 1918 will serve to illustrate the subject. The narrative is by a member of President Wilson's War Labor Board:

> After a prolonged strike and the War Labor Board had rendered a decision against the strikers they refused to return to work. The President of the United States then wrote to the strikers upholding the authority of the Board, pointing out that if the strikers did not return to work they would be barred from any war work in Bridgeport for a year, that the United States Employment Service would not obtain positions for them elsewhere, and that the draft boards would be instructed to reject any claim for exemptions based upon their alleged usefulness in war production. This ended the strike.

Indeed, according to Mr. Baruch, chairman of the War Industries Board, that agency carried the indirect-sanctions idea even farther at times. Violators of its orders, "when detected, were induced or coerced into forfeiting materials or making 'voluntary' cash payments to philanthropic organizations, to the United States Treasury, etc." That is to say, forfeitures and payments that were in essence legal penalties "were imposed and acquiesced in," although, as Mr. Baruch concedes, they were utterly devoid of legal authority. They were in fact a species of blackmail. In the Second World War the presidential agencies that were especially dependent on indirect sanctions were those that exercised the President's prerogative powers, in contrast to his delegated powers. This was originally the situation of the War Labor Board; and it remained the situation of the War Manpower Commission throughout.

Ultimately the War Manpower Commission, finding itself in control of eighty-five per cent of the working forces of the nation, decreed that henceforth all male workers in the United States were to be hired exclusively through USES (United States Employment Service), another presidential agency that acted subject to the Commission's directives. To effectuate this turn of policy the support of employers was of course necessary, and this was guaranteed in a variety of ways. As the *Labor Relations Reporter* explained it, for employers who did not string along with the program "psychological pressure" would be used at first, publicity to stir up community reaction, and then pressure from local management labor committees. In addition such employers might find their power, light, and heat turned off and might be deprived of shipping facilities and materials.

> The WMC stated [the *Reporter* continues] that government contracts might be withheld from employers found to be in willful and substantial noncompliance with the ceiling program. Since violators would have all their labor referrals and other manpower services cancelled, government procurement officers would be unable to renew or place contracts with such firms on the ground that they might be unable to manufacture the products specified for lack of available manpower.

Sanctions so stringent, functioning mainly through employment ceilings and priority referrals, obviously approached the drastic extreme of a labor draft by presidential decree. If an employer had more workers than his ceiling, he was forced to give them up; if certain workers of a particular firm were needed elsewhere, the firm had to terminate their services, and the workers had to transfer to the employment to which they were referred.

The Steel Seizure Case

All this was accomplished by Mr. Roosevelt in reliance

on his powers as "Commander-in-Chief in wartime." But even prior to the Second World War Presidents had gradually built up a practice of intervening without legal authorization, sometimes indeed to the derogation of applicable law, in labor-management disputes.[10] The war being over, Congress, now in the control of the Republicans, decided that it was time to subject such informal interventions to a prescribed procedure, and with this end in view brought forward what presently became the Taft-Hartley (Labor Management Relations) Act. The measure was sharply opposed by labor spokesmen on account of a provision authorizing the federal courts on the petition of the Attorney General, to enjoin strikes or lockouts that were found to "imperil the national health or safety." "The inherent power of the President," the protestants alleged, citing Attorney General Clark, "to deal with emergencies affecting the health, safety and welfare of the entire nation is very great." On this showing President Truman vetoed the bill, but when it became law over his veto he gave solemn assurance that he would observe it.[11] Nevertheless, when in April 1952 a nation-wide strike of steel workers threatened, the President, without referring to the Taft-Hartley Act, whose procedures he by-passed, or to any other statutory warrant for such action, directed the Secretary of Commerce to seize and operate most of the steel mills of the country. His stated justification was the requirements of national security at

[10] This practice stemmed in the first instance from the famous Debs Case of 1895, 158 U. S. 564. For a list of major labor disputes in which Presidents intervened in the capacity of policeman-mediator between 1902 and 1947, *see The President, Office and Powers*, pp. 453–54. *See also* B. M. Rich, *The Presidents and Civil Disorders* (Washington, 1941).

[11] *See* Corwin, *A Constitution of Powers in a Secular State* (Charlottesville, 1951), 62–63, 75–76.

home and of our allies abroad, and he invoked generally "the authority vested in me by the Constitution and laws of the United States." Before the Secretary could execute the order he was stopped by an injunction, which in due course the Supreme Court affirmed.[12]

The pivotal proposition of "the opinion of the Court," so-called, by Justice Black is that, inasmuch as Congress could have ordered the seizure of the mills, the President lacked power to seize them without its authorization. In support of this position, which purported to have the indorsement of four other members of the Court, Justice Black invoked the principle of the Separation of Powers, but otherwise adduced no proof from previous decisions or from governmental practice. In the circumstances of the case this course of reasoning was self-refuting. If the principle of the Separation of Powers prevents the President from doing anything that Congress may do, then by the same token it bars the Supreme Court from doing anything that Congress may do. Yet everybody conceded that Congress could have ended the seizure of the steel mills at any time—precisely what the Supreme Court undertook to do in this case!

For the rest, the opinion bears all the earmarks of hasty improvisation as well as of strong prepossession, being unquestionably contradicted by a long record of presidential pioneering in territory eventually occupied by Congress. Thus Washington, as we have seen, acting on his own in 1793, issued the first neutrality proclamation. The following year Congress, at the President's suggestion, enacted the first neutrality statute. In 1799 the elder Adams extradited the first fugitive from justice under the Jay Treaty and was successfully defended by Marshall in the House of Representa-

[12] Youngstown Sheet and Tube Co. *v.* Sawyer, 343 U. S. 579 (1952).

tives for his course. Not till 1848 did Congress provide another method. And in 1799 an American naval vessel, acting under presidential orders, seized a Danish craft trading in the West Indies. Although the Court disallowed the seizure as violative of an act of Congress, it took pains, by Chief Justice Marshall, to assert that but for the act the President could in the circumstances have ordered the seizure by virtue of his duty "to take care that the laws be faithfully executed" and of his power as commander of the forces. That the President, in the absence of legislation by Congress, may control the landing of foreign cables in the United States and the passage of foreign troops through American territory has been demonstrated repeatedly. Likewise, until Congress acts he may set up military commissions in territory occupied by the armed forces of the United States. During the Civil War Lincoln's suspensions of the writ of habeas corpus paved the way to authorizing legislation. Similarly, his action in seizing the railroad and telegraph lines between Washington and Baltimore in 1861 was followed in 1862 by an act of Congress generally authorizing such seizures when dictated by military necessity as judged by the President.[13]

On the specific issue of seizures of industrial property, Justice Frankfurter incorporates many pertinent data in an appendix to his concurring opinion in the steel case. Of statutes authorizing such seizures he lists eighteen between 1916 and 1951; and of Presidential seizures without specific authorization he lists eight for the First World War period and eleven for the Second World War period, several of which occurred before the outbreak of hostilities. While in the War Labor Disputes Act of June 25, 1943 such seizures were put on a statutory basis, in the United States v. Pewee

[13] Corwin, *op. cit.* in note 3, pp. 126–27 and notes.

Coal Co., Inc. they were impliedly sustained as having been validly made.[14]

In consequence of the evident belief of at least four of the Justices who concurred in the judgment in the steel case that Congress, by the procedures that it had laid down in the Taft-Hartley Act, had exercised its powers in the premises of the case in opposition to seizure, the lesson of the case is somewhat blurred. But that the President does possess, in the absence of restrictive legislation, a residual or resultant power above or in consequence of his granted powers, to deal with emergencies that he regards as threatening the national security, is explicitly asserted by Justice Clark, and the same view is evidently shared, with certain vague qualifications, by Justices Frankfurter and Jackson; and the dissenting Justices would apparently go further. Speaking by the late Chief Justice Vinson, they quote with evident approval—not to say gusto—a passage extracted from the government's brief in United States v. Midwest Oil Co.,[15] in which in 1915 the Court sustained the power of the President to order withdrawals from the public domain not only without the sanction of Congress, but even contrary to its legislation, such legislation having been systematically ignored by successive Presidents through a long term of years.

The passage referred to reads:

> The function of making laws is peculiar to Congress, and the Executive can not exercise that function to any degree. But this is not to say that all of the subjects concerning which laws might be made are perforce removed from the possibility of Executive influence. The Executive may act upon things and upon men in many relations which have not, though they might have, been actually regulated by Congress. In other words, just as there are fields which are peculiar to Congress and fields which are peculiar to the Executive, so there are fields which are common to both, in the sense that the Executive may

[14] 341 U. S. 114 (1951).

[15] 236 U. S. 459.

move within them until they shall have been occupied by legislative action. . . . This situation results from the fact that the President is the active agent, not of Congress, but of the Nation. . . . He is the agent of the people of the United States, deriving all his power from them and responsible directly to them. In no sense is he the agent of Congress. . . . Therefore it follows that in ways short of making laws or disobeying them, the executive may be under a grave constitutional duty to act for the national protection in situations not covered by the acts of Congress, and in which, even, it may not be said that his action is the direct expression of any particular one of the independent powers which are granted to him specifically by the Constitution. Instances wherein the President has felt and fulfilled such a duty have not been rare in our history, though, being for the public benefit and approved by all, his acts have seldom been challenged in the courts.

The reason for the evident satisfaction experienced by the Chief Justice in quoting this passage is that the joint author of it was the late John W. Davis, in 1915 Solicitor General of the United States, in 1952 chief counsel for the steel interest.

What, then is the lesson of the Steel Case? Unquestionably it tends to supplement presidential emergency power with a power to adopt temporary remedial legislation when Congress has been, in the judgment of the President, unduly remiss in taking cognizance of and acting on a given situation. In other words, the lesson of the case is that, just as nature abhors a vacuum, so does an age of emergency. Let Congress see to it, then, that no such vacuum occurs. The best escape from presidential autocracy in the age we inhabit is not, in short, judicial review, which can supply only a vacuum, but timely legislation.

In brief, the President's duty "to take care that the laws be faithfully executed" becomes at times the power to make laws. Nor is this the whole story, as we see when we recur to the practice of Congress in recent decades of making broad unbounded delegations of power to the President. The approach of war with Germany in 1917, the war itself, the

economic crisis that confronted the country in 1932 and the years immediately following—these produced a considerable crop of statutory provisions delegating powers to the President to be exercised by him "in cases of emergency," of "extreme emergency," of "sufficient emergency," "in time of war or similar emergency," in "a state of public peril," and so on; and this practice was, of course, resumed following our abrupt precipitation into the Second World War. The dimensions that it assumed are revealed by the fact that President Truman, in his proclamation of December 31, 1946 declaring the war to be at an end, announced that it terminated some twenty statutes at once and foreshadowed the demise of thirty-three others, and that as to still others he intended to ask Congress for their renewal in whole or in part.[16]

Presidential Warmaking

We now return to base, i.e. to the Constitutional document and, more specifically, to the "take-care" clause. The starting point is Hamilton's contention, which he advanced in support of Washington's proclamation of neutrality of 1793, that the laws whose faithful execution the President is obliged to forward comprise not only the Constitution and laws and treaties of the United States, but international law as well, and that hence the President's responsibility extends to the discharge of American duties and to the protection of American rights and interests abroad. Hamilton thus adumbrated a presidential function the performance of which has been difficult at times to demark from the war-declaring power of Congress. The framers of the Constitution had, in fact, pointed the way to this very development.

[16] *The President, Office and Powers,* 496.

Thus, when it was proposed in the Federal Convention, on August 17, 1787, to authorize Congress to "make war," Madison and Gerry "moved to insert 'declare,' striking out 'make' war, leaving to the Executive the power to repel sudden attacks," and the motion carried.[17] When, nevertheless, early in Jefferson's first administration, the question arose whether the President had the right to employ naval forces to protect American shipping against the Tripolitan pirates, Jefferson was so doubtful on the point that he instructed his commander that if he took any prisoners he should release them; and that while he might disarm captured vessels in self-defense, he must release those too. These scruples excited the derision of Hamilton;[18] he argued that if we were attacked, we were *ipso facto* at war willy-nilly and that Congress's prerogative was exclusive only when it came to putting the country into a state of war *ab initio*. At the time Jefferson's view prevailed, Congress formally voting him war powers against the Bey of Tripoli. Later developments have abundantly established Hamilton's thesis."[19]

Thus, commenting on the action of Lieutenant Hollins in 1854 in ordering the bombardment of Greytown, Nicaragua, in default of reparations from the local authorities for an attack by a mob on the United States consul stationed there, Justice Nelson, on circuit, said: "As respects the interposition of the Executive abroad for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President . . . under our system of government the citizen abroad is as much entitled to

[17] Farrand, *Records* . . . , II, 318.

[18] *Works* (Hamilton, ed.), VII, 745–48.

[19] For an effort that didn't come off on the part of Woodrow Wilson to apply the Jeffersonian tactic, *see The President, Office and Powers,* 476–77.

protection as the citizen at home,"[20] words endorsed by the Supreme Court in 1890. The President's duty, said Justice Miller, is not limited "to the enforcement of acts of Congress or of treaties of the United States according to their express terms," but includes "the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the Government under the Constitution."[21]

Mr. James Grafton Rogers, in his little volume *World Policing and the Constitution,* lists 149 episodes similar to the Greytown affair, stretching between the undeclared war with France in 1798 and Pearl Harbor. The list, though it invites some pruning, demonstrates beyond preadventure the existence in the President of power as Chief Executive and Commander in Chief to judge whether a situation requires the use of available forces to protect American rights of person and property outside the United States and to take action in harmony with his decision. It is true that such employment of the forces has usually comprised justifiable acts of self-defense, but the countries in which they occurred were nevertheless entitled to treat them as acts of war, although they have generally been too feeble to assert their prerogative in this respect and have sometimes chosen to turn the other cheek. Thus, when in 1900 President McKinley, without consulting Congress, contributed 5,000 men and a sizable naval contingent to the joint forces that went to the relief of the foreign legations in Peking, the Chinese Imperial Government itself agreed that this action had not constituted war.

And Article V of the Atlantic Pact builds on such precedents. Its novel feature is its enlarged conception of

[20] Durand *v.* Hollins, 4 Blatch. 451, 454 (1860).
[21] *In re* Neagle, 135 U. S. 1, 64.

defensible American interests abroad. In the words of the published abstract of the Report of the Committee on Foreign Relations concerning the Pact: "Article V records what is a fact, namely, that an armed attack within the meaning of the treaty would in the present-day world constitute an attack upon the entire community comprising the parties to the treaty, including the United States. Accordingly, the President and the Congress, each within their sphere of assigned constitutional responsibilities, would be expected to take all action necessary and appropriate to protect the United States against the consequences and dangers of an armed attack committed against any party to the treaty."[22] But by the very nature of things the discharge of this obligation against overt force will ordinarily rest with the President in the first instance, just as the discharge in the past of the like obligation in the protection of American rights abroad has rested with him. Furthermore, in the discharge of this obligation the President will ordinarily be required to use force and to perform acts of war. Such is the verdict of history—a verdict reaffirmed by our intervention in Korea under the auspices of the United Nations. President Eisenhower, then, had the book on his side when he said on St. Patrick's Day, 1954, that "hanging ought to be the fate of any President who failed to act instantly to protect the American people against a sudden attack in this atomic age." What, however, of his "implied agreement" with Secretary Dulles's view, that the President can strike back also against an assault on any one of thirty-three allied countries in Europe, the Middle East, and the Americas? In such an event it would appear, indeed, that the President would be acting as executive not only of international law, but also of

[22] *A Decade of American Foreign Relations,* Senate Document #123, 81st Congress, 1st Session (1950).

certain treaties of a sort that Senator Bricker has no magic against.

Treaties and Executive Agreements; The Senate's Abdication

The foregoing brings us to a subject that of late has been much before the public: the power of the President to enter into international agreements. The Constitution (Article II, section 2, clause 1) reads: "He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." It is usual to regard the process of treaty making as falling into two parts, negotiation and ratification, and to assign the former to the President exclusively and the latter to the Senate exclusively. It will be observed, however, that in fact the Constitution makes no such division of the subject. Originally, indeed, Washington endeavored to take counsel with the Senate regarding the drafting of treaties, but the Senate itself created so many difficulties that he speedily abandoned the procedure, with the result that what was intended to be one authority consisting of two closely collaborating organs became split into two, often antagonistic, authorities performing sharply differentiated functions. Today the actual initiation and negotiation of treaties is, by the vast weight of both practice and opinion, the President's alone.[23]

Furthermore the President frequently negotiates, besides treaties proper, agreements with other governments that are not referred to the Senate for its advice and consent. These are of two kinds: those that he is authorized by Congress to

[23] *The President, Office and Powers,* 253-59; *see also* reference in note 7 *supra.*

make or that he lays before Congress for approval and implementation; and those that he enters into by virtue simply of his diplomatic powers and powers as Commander in Chief. As early as 1792 Congress authorized the Postmaster General to enter into postal conventions; as recently as 1934 it authorized the President to enter into foreign trade agreements and to lower customs rates as much as fifty per cent on imports from the other contracting countries in return for equivalent concessions, an authorization renewed in 1937, 1940, and 1943. The Lend-Lease Act of March 11, 1941, dealt with previously, belongs to the same category.[24]

Instances of treaty making by the President without the aid or consent of either Congress or the Senate are still more numerous. One was the exchange of notes in 1817 between the British Minister Bagot and Secretary of State Rush for the limitation of naval forces on the Great Lakes. A year later it was submitted to the Senate, which promptly ratified it. Of like sort were the protocol of August 12, 1898 between the United States and Spain, by which Spain agreed to relinquish all title to Cuba and to cede Puerto Rico and her other West Indian possessions to the United States; the exchange of notes between the Department of State and various European governments in 1899 and 1900 with reference to the "open door" in China; the "Gentlemen's Agreement," first drawn in 1907, by which Japanese immigration to this country was long regulated; the *modus vivendi* by which after the termination of the Treaty of Washington in 1885 American fishing rights off the coast of Canada and Newfoundland were defined for more than a quarter of a century; the protocol for ending the Boxer Rebellion in 1901; the notorious Lansing-Ishii agreement of November 2, 1917, recognizing that Japan had special rights in China; and the

[24] *The Constitution and What It Means Today,* 112.

armistice of November 11, 1918—to say nothing of that entire complexus of conventions and understandings by which our relations with our "associates" in the First World War and our "allies" in the Second World War were determined—the last-named group including two, those labeled "Yalta" and "Potsdam," that have achieved a special notoriety.[25]

Obviously the line between such agreements and those that have to be submitted to the Senate is not easily defined. When the Senate refused in 1905 to ratify a treaty that Theodore Roosevelt had entered into with the government of Santo Domingo for putting its customs houses under United States control, the President simply changed the treaty into an agreement and proceeded to carry out its terms, with the result that a year or so later the Senate capitulated and ratified the agreement, thereby converting it once more into a treaty. Furthermore, by recent decisions of the Supreme Court an executive agreement within the power of the President to make is law of the land to which the courts must give effect, any state law or judicial policy to the contrary notwithstanding.[26] That Congress, which can at any time repeal any treaty as "law of the land or authorization," can do the same to executive agreements would appear to be obvious.[27]

Nor is the executive agreement, whether made with or without the sanction of Congress, the only inroad that practice under the Constitution has made on the original role of the

[25] *Ibid.*, 112–13.

[26] United States *v.* Belmont, 301 U. S. (1937); United States *v.* Pink, 315 U. S. 203 (1942).

[27] Heat Money Cases, 112 U. S. 580 (1884); La Abra Mining Co. *v.* U. S., 175 U. S. 423, 460 (1899). *See also* R. S., Secs. 1999, 2000 as indicative of the power of Congress to determine what law shall be enforced in the courts of these United States.

Senate in treaty making. Not only is the business of negotiation today within the President's exclusive province, as was pointed out above, but Congress and the President have also come into possession of a quite indefinite power to legislate with respect to external affairs. The annexation of Texas in 1845 by joint resolution is the leading precedent. The example thus set was followed a half century later in connection with Hawaii; and of similar import are the joint resolution of July 2, 1921 by which war with the Central Powers was brought to a close and the joint resolution of June 19, 1934 by which the President was enabled to accept membership for the United States in the International Labor Organization.[28] Such precedents make it difficult to state any limit to the power of the President and Congress, acting jointly, to implement effectively any foreign policy on which they agree, no matter how "the recalcitrant third plus one man" of the Senate may feel about the matter.

Presidential Confidences and Confidants

The last phase of presidential prerogative to receive attention here, one that has been recently much in the public eye, stems also from the "take-care" clause. The reference is to the President's right to protect official confidences between himself and his subordinates from undue judicial and congressional curiosity. The leading case on the subject is still Marbury v. Madison.[29] In the course of the argument the Attorney General, pointing out that he was acting as Secretary of State at the time of the transaction involved, stated that "he felt himself bound to maintain the rights of the executive" and that he ought not to answer concerning "any

[28] 42 Stat. 105; 49 Stat. 2741.

[29] See note 3 *supra*.

facts which came officially to his knowledge while acting as Secretary of State." The Chief Justice, though of the opinion that nothing confidential was in fact involved, conceded none the less that "if he [the Attorney General] thought that anything was communicated to him in confidence he ought not to answer concerning it."

But even earlier, as Attorney General Brownell recently showed,[30] President Washington had taken the position, apropos of a congressional inquiry, that although he ought to communicate to the committee conducting the inquiry, at its request, such papers as the public interest demanded, he ought, on the other hand, to withhold any the disclosure of which might injure the public interest, *and that he was the judge of this matter.* Nearly a century later the Senate Judiciary Committee tangled with President Cleveland on the same issue. The Attorney General of that day having refused to furnish certain documents, the Committee advanced the sweeping contention that it was entitled to know all that officially takes place in any of the departments of government, to which assertion the President replied that, though he had no intention of withholding any official papers, he denied that "papers inherently private or confidential" became official merely by being lodged in the custody of a public department. In a similar controversy in 1909 between the Senate Judiciary Committee and President Theodore Roosevelt, the President assured the chairman of the committee that he, Roosevelt, had the desired papers, but that the only way the Senate could get them was through his impeachment. Some of the facts contained in the papers, he further explained, were given to the government under the seal of secrecy, and "I will see to it that the word of this government to individuals is kept sacred."

[30] *New York Times,* May 18, 1954.

In April 1941, to turn to a more modern instance, the chairman of the House Committee on Naval Affairs, in a letter addressed to Attorney General Jackson, asked that the Committee be furnished with all FBI reports since June 1939 and all future reports. The Attorney General answered: "It is the position of this Department, now repeated with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest." "Disclosure of the reports could not do otherwise," he continued, "than seriously prejudice law enforcement," as by identifying sources, etc. It "would also prejudice the national defense and be of aid and comfort to the very subversive elements against which you wish to protect the country." It would violate pledges of secrecy and "might produce the grossest kind of injustice to innocent individuals." The opinion is bolstered by a wealth of precedents both of executive and of judicial provenance.[31]

A more recent controversy was precipitated by President Eisenhower's letter of May 17, 1954 to Secretary of Defense Wilson banning certain testimony in the McCarthy-Army dispute. It reads in part:

> Because it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications or any documents or reproductions concerning such advice be disclosed, you will instruct employees of your department that in all of their appearances before the subcommittee of the Senate Committee on Government Operations regarding the inquiry now

[31] *40 Opinions of the Attorney General*, 45-51 (April 30, 1941).

before it, they are not to testify to any such conversations or communications or to produce any such documents or reproductions.

Although the order was assailed by Senator McCarthy, who demanded that it be "trimmed," it seems to be well within the pattern set by the precedents compiled by the Attorney General.

On the other hand, the President's determination announced on June 6, 1954 to prevent—apparently *in toto*—any investigation of the Central Intelligence Agency by Senator McCarthy plainly exceeds this pattern. Indeed, it contradicts the President's own recognition in his letter to Secretary Wilson of the general right of Congressional committees to request "information relating to any matter" within their jurisdiction, "certain historical exceptions" aside. In the words of the *New York Times* in its editorial column of June 8, 1954: "The intelligence work of the CIA under its able director, Allen W. Dulles, is vital to this Government . . . ." Yet "no one outside the agency itself really knows whether it is doing an efficient job, whether it is overstaffed, whether it duplicates work of other agencies, whether it gets into operations where it has no business, whether it wastes money, whether it interferes with the conduct of our foreign policy, and so forth. Because it is almost completely cut off from Congress, it is an object of suspicion by Congress. Obviously, we are not urging publicity for the work of the CIA, and of course an investigation of the type Senator McCarthy would conduct (or for that matter any public inquiry) could well be disastrous." [32]

As recently as November 1955 government secrecy was meeting with considerable criticism, especially from the press—a not entirely disinterested source. At the same time the condemned practice did not lack defenders. The general

[32] *New York Times* (editorial), June 8, 1954.

counsel of the Civil Service Commission voiced the opinion that "There comes a time when you have to withhold things in the public interest." Can an adequate definition of such times be given legal formulation? A subcommittee of the House Government Operations Committee was then struggling with the question. Perhaps the best solution, it was suggested, would be a permanent committee to keep "the spotlight trained on the Executive Branch and its news practices." Recent events suggest that presidential prerogative in this area may be in for some pruning.[33]

Summary and Assessment

It was discovered at the very outset of the government under the Constitution that enlarged views of presidential power commanded an open road into the Constitution in the initial words of Article II—the executive-power clause. Later the Commander-in-Chief clause revealed even greater potentialities, and meantime the "take-care" clause had come to be invoked. Long before this, moreover, the Senate, by abdicating its intended participation in the elaboration of treaties in order to seize upon an unlimited power to amend or reject them, smoothed the way for the assumption by the President of an indefinite power to enter into executive agreements which, so far as subject matter is concerned, are often indistinguishable from treaties. It is, however, in the twentieth century that presidential power, building on accumulated precedents, has taken on at times, under the stimulation of emergency conditions, the dimensions of executive preroga-

[33] *See New York Times,* issues of November 4th, 13th, and 29th; *also* annotated statement of November 26, 1955, by Harold L. Cross to House Government Subcommittee of the Committee on Government Operations.

tive as described by John Locke; of a power to wit, to fill needed gaps in the law, or even to supersede it so far as may be requisite to realize "the fundamental law of nature and government, namely, that as much as may be all the members of society are to be preserved."

Theodore Roosevelt, expounding his so-called Stewardship Theory of the presidency, wrote in 1913 that "it was not only his [the President's] right but his duty to do anything that the needs of the Nation"—as judged by himself, of course—"demanded unless such action was forbidden by the Constitution or by the laws." [34] An astringent critic of the Stewardship Theory was ex-President Taft, who protested in *Our Chief Magistrate and his Powers,* written while he was a professor at Yale, that the Constitution did not cast the President in the role of Universal Providence, but confined his activities to the powers given him by the definite clauses of Article II.[35] A few years later, nevertheless, we find Mr. Taft, as Chief Justice, demonstrating at vast length, in one of the thickest opinions ever handed down by the Court, how very right indeed Madison *et al.* had been in 1789 in deducing an unqualified power of removal from the opening clause of that Article.[36] That Taft's successor to the presidency underwent a comparable conversion, we saw earlier.

The first Roosevelt, however, wrote in the piping times of peace. The second Roosevelt elaborated his conception of the powers of the President as Commander in Chief in wartime in the midst of hostilities. The occasion was his demand on September 7, 1942 that Congress repeal forthwith

[34] *Autobiography,* 388–89.

[35] *Our Chief Magistrate and His Powers* (New York. 1916) 139-40.

[36] *See* note 1 *supra.*

certain so-called parity provisions of the Price Control Act. This is what he said:

> I ask the Congress to take this action by the first of October. Inaction on your part by that date will leave me an inescapable responsibility to the people of this country to see to it that the war effort is no longer imperiled by the threat of economic chaos.
>
> In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act.
>
> At the same time that fair prices are stabilized, wages can and will be stabilized also. This I will do.
>
> The President has the powers, under the Constitution and under congressional acts, to take measures necessary to avert a disaster which would interfere with the winning of the war.
>
> I have given the most thoughtful consideration to meeting this issue without further reference to the Congress. I have determined, however, on this vital matter to consult with the Congress.
>
> The American people can be sure that I will use my powers with a full sense of my responsibility to the Constitution and to my country. The American people can also be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our own safety demands such defeat.
>
> When the war is won, the powers under which I act automatically revert to the people—to whom they belong.[37]

What we have here is certainly a rather far-reaching proposition. The President of the United States is claiming the right to repeal an act of Congress, although he does not deny that Congress had the power to pass it. To be sure, other Presidents have occasionally refused to enforce acts of Congress, though very rarely, and always on the ground that the acts in question were unconstitutional. This was Andrew Johnson's contention in 1867 respecting the Tenure of Office Act; as it was Woodrow Wilson's respecting the Jones Shipping Act of 1920.[38] But nobody would venture to deny that Congress had the right to pass the Emergency

[37] *President, Office and Powers,* 303–6.

[38] *Ibid.,* 231, 471. The story is amusing.

Price Control Act or that it was the only organ of the government that did have that right; and yet the President claimed the right to repeal the law. That was a claim of power to suspend the Constitution, and moreover to suspend it as to it most important feature, the division of power between the President and Congress.

Yet any candid person must admit that a situation might arise in which it would be necessary to suspend the Constitution. Abraham Lincoln admitted that he did not know whether or not he had suspended a part of it when he suspended the writ of habeas corpus; but, said he, "Are all the laws to go unenforced in order that one law may be preserved?" When Mr. Roosevelt spoke, however, Congress was in session, and it might seem that if the situation was so desperate as to require suspension of the Constitution, the safe view to take was that Congress was aware of the fact as well as the President and should be joined in the enterprise. And yet, suppose that an atom bomb were to be dropped on Washington, New York, or Los Angeles: whose duty would it be to proclaim martial law and thereby suspend the Constitution?

For the rest, it must be admitted that Roosevelt's attempt to establish a whole series of new offices and his attempt to rule labor for two years without a whit of authorization by Congress prevailed *in fact;* why not, then, *in law?* And if in law, then does this law hold when peace, in the sense of the absence of a shooting war, once more supervenes?

Nor may we assess the President's powers as Commander in Chief in wartime without reference to the scope of the war power itself. The Court's doctrine on this point was stated succinctly by Chief Justice Hughes more than twenty years ago in the following curt terms: "The war power of

the Federal Government is a power to wage war successfully."[39] But who is to judge what measures *are* necessary to bring a war to a successful conclusion? Certainly not the Court, as was amply demonstrated when in 1944 it sustained the measures that the Government adopted early in the Second World War respecting Japanese residents on the West Coast. What, in brief, these measures accomplished was the removal of 112,000 Japanese, two thirds of them citizens of the United States by birth, from their homes and properties and their temporary segregation in assembly centers, later styled relocation centers.[40] No such wholesale or drastic invasion of the rights of citizens of the United States by their own government had ever occurred in the history of the country. These measures, moreover, were initially drafted as a presidential order, although before being put into operation they were formally enacted by Congress. The Court's reliance was on the broad scope of the blended powers of the President and Congress in wartime.

If, then, the question be asked: How does presidential prerogative today compare with the constitutional scheme of things? the answer must undoubtedly be: *The power of the President as Commander in Chief in wartime is subject only to such restraints as Congress may effectively impose.* For the

[39] Home Building and Loan Assoc. *v.* Blaisdell, 290 U. S. 398, 426 (1934). The war power and other powers of foreign relationship were declared by Justice Sutherland, for the Court, in the Curtiss-Wright Case, to devolve on the Federal Government simply "as necessary concomitants of nationality" and so were not dependent "on the affirmative grants of the Constitution." 299 U. S. 304, 317–18 (1936). In the more recent case of Lichter *v.* United States, 334 U. S. 742 (1948) the Court appears to regard the war power as derived from the Constitution.

[40] *The Constitution and What It Means Today,* 66-67.

rest, he "is accountable only to his country in his political character and to his own conscience."[41]

Which brings us to the subject of the President as legislative and popular leader.

[41] *See* note 3 *supra*. Secretary Seward summed up his estimate of the Presidency in 1863 on the basis of his observation of President Lincoln's acts as Commander in Chief, as follows: "We elect a king for four years, and give him absolute power within certain limits, which after all he can interpret for himself." Ford, *Rise and Growth*, 291. For a period of war, and civil war at that, he was probably not far from wrong.

"In time of peace," wrote Jefferson in 1810, "the people look most to their representatives; but in war, to the Executive solely." *Writings* (P. L. Ford, ed.), IX, 272.

Chapter III

Presidential Leadership

THE PRESIDENCY is a unique organ of leadership. Of those who govern the United States the President alone is accountable to a national constituency, and the prestige and power of his office make anything that he says and does a matter of instant interest to the country at large and, often, to many peoples abroad. It is he of all officialdom who best satisfies what Woodrow Wilson called the craving of the public for a single leader. He is the outstanding human symbol of the country's unity, history, and patriotism. It is he to whom we instinctively look in crisis or disaster.

In large measure presidential leadership is a concomitant of the country's industrial maturation. For the most continuous preoccupation of the modern President's leadership has been with programs and policies to alleviate the social injustices and economic abuses of industrialism. These can be traced back to the Civil War and its aftermath, when the organization of production and distribution had ceased to be simply an individual effort directed to a local market and had become a giant concerted effort to serve national and international markets. The resultant concentration of economic power was often abusively used, with the consequence that the consumer, the worker, the individual producer, and the community suffered. Nineteenth-century Presidents acted sporadically, and on the whole unimpressively, to deal with these wrongs, but it was Theodore Roosevelt who first directed at them a full-scale presidential attack. By his great

gifts of exhortation Roosevelt rallied the attention of Congress and of the people to the necessity of reform. Railroad legislation, the Federal Employers' Liability Act, the Pure Food and Meat Inspection laws, and a dynamic campaign against the trusts were the product of his administration. Nearly all Roosevelt's successors, from Taft to Eisenhower, have to some degree followed his pattern by sponsoring measures to improve social well-being and curb economic malpractices. Hence the New Freedom of Woodrow Wilson, the New Deal of Franklin D. Roosevelt, the Fair Deal of Harry S. Truman.

But today's President is more than a national leader. The Second World War and its aftermath wrought an impressive development of the Presidency as a world institution and of the President as a world chief. He is a leader who must get on with many other leaders and win the acceptance and confidence of peoples everywhere. As head of the principal military power of the free world he provides leadership to a half dozen military alliances around the globe. The United Nations can be materially affected for good or ill by his decisions. Through the Voice of America his words are beamed to many peoples. In the Point Four program he becomes both the symbol and the instrument of the concern of our people for the welfare of less fortunate peoples.

Recent Presidents have characteristically viewed their office as primarily one of leadership. Franklin D. Roosevelt saw the Presidency as "pre-eminently a place of moral leadership," whose function was to apply in new conditions "the simple rules of human conduct to which we always go back. Without leadership alert and sensitive to change, we are all bogged down or lose our way." [1] McKinley and Theodore

[1] Quoted in James M. Burns, *Congress on Trial* (New York, 1949), 163.

Roosevelt, like Polk two generations earlier, described themselves as representatives of the whole people. Mr. Truman viewed himself as "lobbyist for the people" in a government that, as he saw it, was excessively preyed upon by special interests. "The people have no lobby in Washington," he asserted, "looking out for their interests except the President of the United States, and it's too bad if the President does not work for their own good." [2]

And it is obvious that the realities of the electoral system require Presidents, in order to win office and to keep their party in power, to appeal to a broad variety of functional and sectional interests. The second Roosevelt's support, for example, derived from a combination of big labor, Southerners, city bosses, New Dealers, and independent voters. The President's perennial task is thus one of devising workable adjustments of the conflicting wills of the sundry groups whose support he requires. He is consequently an inveterate seeker of concurrences and balances between sections and groups in a process that Frederick Jackson Turner likened to that which obtains in the formulation of general European treaties, so continental and diversified is the United States.[3]

At the same time it is also true that Presidents often come into ascendancy because they serve better than Congress as a medium of power for the advancement of certain dominant interests of the nation. In recent decades, thanks especially to the rapid urbanization of the country, the presidency has been looked to increasingly to advance the causes of various large urban interests, significantly dispersed in terms of electoral votes and impressive in their size and voting solidarity. The most notable of these urban interests

[2] From William Hillman, *Mr. President* (New York, 1952), 195.

[3] Quoted in Wilfred Binkley, *President and Congress* (New York, 1947), 296.

are labor and national or racial groups; these have difficulty in advancing their causes through Congress, which has generally served more effectively as a medium for farm and business groups.[4]

Presidential leadership is largely a matter of two factors, personality and opportunity. Although the human personality is a complex, endlessly varied thing, the Presidents whose leadership has made a substantial impact have displayed certain qualities in common. They have been men of courage, firmness, flexibility (even opportunism), and manipulative ability. They have been adept at discerning the currents of the time and directing them into constructive channels. They are men of imagination and vision who avoid getting lost in details and in petty quarrels; they set their own sights. One significance of the extraordinary concentration of power and responsibility in the Presidency is that it provides infinite opportunity for personal self-expression.[5]

But presidential leadership cannot thrive unless the times call for it. If the country is engripped in an economic depression or war, the leadership of the President is inescapable. On such occasions the unity of purpose of society will tolerate strong presidential leadership. Let the emergency subside, however—or, more important, let the people think it has done so—and the previous unity is soon displaced by the divided purposes that normally characterize society. In such circumstances the presidency, which is functionally adapted as a vehicle of unity, retires into the background, and the legislature, in which the divided purposes of society find the readiest expression, becomes ascendant. Presidential leader-

[4] Wilfred Binkley, "The President and Congress," 11 *The Journal of Politics,* 67 ff.

[5] See H. S. Commager, "Yardstick for a Presidential Candidate," *New York Times Magazine,* October 5, 1947.

ship is, in short, subject to a law of ebb and flow. A manifestation of this law is the fact that a strong President has usually been followed by one or more of mediocre ability. Although it is true that a President of the force of Franklin Roosevelt was elected to four terms of office, his fortunes too ebbed at times. Compare, for example, the record of accomplishment of his first term with that of his second.

Discoverer and Builder of Public Sentiment

Few Presidents have been unaware of the power that is theirs if they can but divine and rally public opinion. Until the twentieth century, however, the limitations of scientific developments in communications enabled even the most effective President to shape public opinion only at a moderate pace and on few issues in the course of a four-year term. Theodore Roosevelt, the first modern President to exploit fully the possibilities of rallying public opinion behind his policies, had the enormous advantage of press services of nation-wide circulation and other facilities for the rapid dissemination of the news. The tremendous impact made by Franklin D. Roosevelt could never have occurred without the radio and his forté, the Fireside Chat, which projected into millions of homes his intimate reports on his stewardship.[6]

Although the instruments of mass communication have vastly increased the size and immediacy of the modern President's audience, they have in some ways made his job more complicated and difficult. A President who does not excel in the technique of the dominant communications media of his time may be seriously handicapped in developing a favorable image of his leadership among the public. Presi-

[6] F.D.R.'s technique is summarized in Binkley, *President and Congress,* 245–66.

dent Truman, for example, was at best only moderately effective on the radio, a circumstance that was particularly detrimental when, faced with obstruction in Congress, he could not rally public opinion to his support. Eventually he found his métier in the old-fashioned whistle stop harangue, which, although good at winning elections, conspicuously failed to mobilize public support to push his programs through Congress.

But the President must not only manufacture public sentiment, he must continually gauge it. He must know what the public wants, how his program is being received, and what the opposition is saying at the grassroots. Nor can he rely for this information solely on his entourage. They may not really know, or at best, in the peculiar isolation of Washington, may have only the sketchiest impressions; and in any event, since they have axes to grind and wish above all to remain in favor, they are prone to tell the President only what they think he wishes to hear. The President is consequently driven to use a variety of expedients, all of them more or less crude and fragmentary, to take soundings of the public mood.

He puts up trial balloons and watches public opinion polls. He follows the press to learn what it is saying for and against his administration. When the second Roosevelt entered the White House his secretary, Louis McHenry Howe, busied himself with the compiling of a daily digest of editorial opinion from 750 newspapers representing every city of more than 25,000 population. Most Presidents are themselves more assiduous newspaper readers than their fellow citizens. Mr. Truman spent every day from 5:30 A.M. to 7:00 perusing the *New York Times,* the *New York Herald Tribune,* and the former *Washington Times-Herald,* which carried such antiadministration columnists as Pegler and Sokolsky.

Letters and telegrams to the White House are studied and interpreted, although it is only in recent years that their volume has been significant. In Harding's time letters numbered about 400 a day. In Franklin Roosevelt's they rose to an average of 4,000, and it took a considerable clerical staff to digest, abstract, answer, file, and index them. White House mail in the Truman and Eisenhower administrations has been similarly heavy.

Presidents also look to visitors and personal correspondents for gleanings of public sentiment. Washington, throughout his presidency, carried on an extensive correspondence with persons of various callings and outlooks, well distributed around the country and in Europe. Oftentimes he requested that the opinions they encountered concerning his administration be freely and frankly conveyed, no matter how unfavorable.[7] As to visitors, former President Truman has characterized them as "valuable to the President, for they help him keep in touch with the cross section of American interests and opinion." He closely systematized the considerable time he spent on conferences with visitors. By setting aside an average of four hours of every workday he disposed of ninety-five appointments a week, in the course of which he might see two hundred and fifty persons. Limited, with few exceptions, to fifteen minutes, the callers were asked to present to the White House appointments secretary well beforehand brief memoranda on the subjects to be discussed. The President was handed a caller's memorandum just before the conference. The visitor did most of the talking, thus maximizing Mr. Truman's intake of information, conserving his energies, and leaving him free to make

[7] *See,* for example, Washington's letter to David Stuart, April 11, 1790, in J. C. Fitzpatrick, ed., *The Writings of George Washington* (Washington, 1931), Volume XXI, 35.

marginal notes on the memorandum. If action were required, the memorandum, with the President's notations, was routed to a White House aide or to a department.[8]

A novel twist to the process of information-gathering was provided by the Eisenhower administration when it harnessed an ancient social institution, the stag dinner, to the exigencies of the presidency. Normally monthly affairs with fifteen to eighteen guests and considerable opportunity for informal talk, these dinners have proved useful for checking responses to the administration's program and for picking up new ideas. Until March 1955 the guest lists of these occasions were published, a practice abandoned after a published analysis of a number of lists showed an exceptional concentration of the President's guests among business men and allied interests.[9]

Presidents, moreover, have traveled extensively, both to inform themselves of popular sentiments and to expound their programs and exhort the voters. Almost from the time the office was established they have been peregrinators. Washington, less than a year after his inauguration, toured the Southern states to confer with governors, legislators, and friends on local attitudes toward his administration. On returning to the capital he wrote David Humphreys, friend and aide-de-camp: "I am much pleased that I have taken this journey as it has enabled me to see with my own eyes the situation of the country thro' which we traveled and to learn more accurately the disposition of the people than I could have done by any information."[10]

A latterday President is equipped with a special yacht,

[8] *New York Times,* March 16, 1947.

[9] *New York Times,* March 5, 1955.

[10] July 20, 1791, in J. C. Fitzpatrick, ed., *The Writings of George Washington,* Volume XXI, 317.

an airplane, and railway cars, of which he makes full use. Franklin Roosevelt in the course of various political campaigns, inspection tours, and dedications of parks, post offices, and the like, journeyed some thousands of miles in the United States in his first two terms of office. Although the Eisenhower administration cannot boast a comparable mileage inside the United States, it was the first presidency in history that exerted a major effort to make itself visible to and win the support of nations and peoples around the world. The pursuit of these objectives was virtually a solo enterprise of Vice-President Richard Nixon. By mid-1955 he had traveled 52,652 miles—more than twice around the world—by air, rail, auto, boat, carriage, and oxcart for visits to thirty countries and meetings with two emperors, three kings, seventeen presidents, six prime ministers, and two governors general in the Far East and Latin America. He had shaken hands with literally thousands of people in all walks of life, heard the views of their leaders, and presented the spectacle of a high United States official as being interested in learning their problems on the spot and winning their friendship.[11]

As builder of public sentiment, too, the President utilizes an asortment of media and techniques. The day-to-day means of communication of all Presidents, from Washington to Eisenhower, is the press, and for this reason alone, how a President fares with the reporters bears vitally on the success of his leadership. Much of the remarkable leverage of the early New Deal on public sensibilities may be attributed to the constant stream of organized information emanating from the White House and to the fact that most of the correspondents were on the President's side. An in-

[11] Mr. Nixon's own account of his travels is found in "Are Good-Will Trips Worthwhile?" *This Week*, July 31, 1955.

stinctive journalist himself, he could be counted on for a weekly story, a bread-and-butter consideration to the newsmen, and his personal contacts with them were pleasant and intimate. Most important of all, he thoroughly renovated the President's press conference. Under Harding, Coolidge, and Hoover the press conference was an infrequent and stilted affair, a meager source of news. Roosevelt set up two press conferences a week, dropped the requirement that questions be submitted in writing, and with his agile charm developed his sessions with the reporters into lively occasions on which, in effect, he gave the public a full running account of what he was doing and of what he proposed to do and why.[12]

His successors have conducted the press conference with the same persistence, if not always with the same skill. Mr. Truman's sessions, although more numerous, were far briefer, less sprightly, more staccato. He could get the reporters out in ten or twelve minutes with a good volume of news telegraphed to them in brief statements and answers. Often it was largely an off-the-cuff affair and sometimes a chance to show how easily a President can put his foot in his mouth. The earlier Eisenhower press conferences were sometimes handicapped by the President's penchant for delegating matters to subordinates, which sometimes left him a bit short on details when facing queries.

The mechanics of the press conference are, however, few and simple. Over 550 press representatives are accredited to attend, plus a small number of government press officers. From one hundred to two hundred correspondents usually show up at the sessions, which in the Truman ad-

[12] *See* James E. Pollard, *The Presidents and the Press* (New York, 1947), 773–85, and Merriman Smith, *Thank You, Mr. President* (New York, 1947).

ministration were held each Thursday, one week at 10:30 A.M. and the next at 4:00 P.M., in order to divide the advantage between morning and afternoon papers. President Eisenhower permitted the important innovation of letting his weekly sessions be televised. With minor editing the exchange between President and reporters is now shared with the public just as it occurred.

A most important aspect of the press conference is the preparation or briefing of the President for it. In the Truman administration, three quarters of an hour before the reporters were due to arrive the President would closet himself with his staff, and they, led by the press secretary, would badger their chief with the questions that the reporters were expected to ask. The whole range of affairs, both domestic and international, was covered. The staff would criticize the answers and consider with their Chief whether the information or sentiment conveyed ought to be revealed to the world at the time. The problem of *what* to say was, in fact, often secondary to *when* it should be said.[13] President Eisenhower's preparation initiated a somewhat different pattern. Instead of his meeting with his staff, his press secretary, James Hagerty, did that for him the morning before the conference. Hagerty and the staff sought to anticipate questions and gather data for the answers. Thirty or forty minutes before the conference Hagerty went over the assembled questions and answers with the President to bring him up to date on developments, refresh his memory on decisions, and summarize the actual status of any major problem that happened to be to the fore.[14]

The latterday President, in addition to his press con-

[13] *See* Anthony Leviero, "The Press and the President," *New York Times Magazine*, August 21, 1949.

[14] *See New York Times*, February 15, 1954.

ferences, makes speaking appearances before the public. These may be for formal set speeches, such as the President's addresses to Congress and on some occasions to the public. The Eisenhower administration has shown a trend away from this type of speech and has used it only when advance distribution of the President's remarks is politically necessary or when the situation calls for split-second timing.

A second and increasingly important type of speaking presentation is the television and radio talk from notes. President Eisenhower's television report to the nation on the Geneva conference was of this type. Having been thoroughly immersed in the proceedings of the conference, the President went confidently before the people to speak from notes instead of from a prepared text. On the day of his appearance he worked over eight drafts of notes, which he edited and rewrote after receiving a draft of an entire talk from Kevin McCann, his speech-writing assistant. The final notes covered nine pages for an estimated eight minutes of his allotted fourteen on the air. The remaining time the President filled in from memory except for the final two minutes, in which he read a prepared conclusion. This type of planned informality appears well adapted to the television medium. Experience shows that audiences are apt to be repelled by the dull grinding out of a prepared text. Far more conducive to an improved audience rating is the format of the Geneva report: with a minimum of props and advertising slickness the President talks earnestly but informally, fiddling with the papers on his desk, jabbing at the air with his spectacles for emphasis, and generally performing in the manner recommended by Robert Montgomery, White House consultant on television matters.[15]

[15] *See* Merriman Smith, "Evolution of Eisenhower as a Speaker," *New York Times Magazine,* August 7, 1955.

Administrative Chief

As administrative chief the President presides over the biggest administrative enterprise in the free world. The researches of the first Hoover Commission disclosed that the more than 2,000,000 civilian employees of the executive branch are organized into sixty-five departments, administrations, agencies, boards and commissions, all reporting directly to the President. This in itself, as the Hoover Commission pointed out, presented an almost impossible task of supervision: "even one hour a week devoted to each of them would require a sixty-five-hour work week for the President, to say nothing of the time he must devote to his great duties in developing and directing major policies as his constitutional obligations require."

Nevertheless the President has considerable help available for his administrative burdens. In the development and implementation of major policies, as well as in administrative routine, he has a variety of staff assistance, much of it created in the last several decades. Nearly all the President's staff has been gathered into the Executive Office of the President, established in 1939. A leading unit of the Executive Office is the White House Staff, consisting of the President's press and appointments secretaries, the Assistant to the President (Sherman Adams in the Eisenhower administration), various administrative assistants and policy advisers, the Army, Navy, and Air Force aides, an executive clerk, and approximately 250 other employees engaged in clerical and staff work.

Also in the Executive Office is the President's oldest staff agency, the Bureau of the Budget, created by the Budget and Accounting Act of 1921. The Bureau prepares the executive budget and clears departmental proposals and

expressions of views concerning legislative enactments and executive orders and proclamations. It also advises the President on improvements in governmental management, develops administrative reorganization plans, and co-ordinates services such as statistics and publications that are used by many agencies. The General Services Administration, created in 1949 as part of the Executive Office, deals with federal supply, records management, and building operation and management. The President has also an assistant in personnel matters, who, in the Eisenhower administration, has also served as chairman of the Civil Service Commission.

Among the most important agencies of the Executive Office assisting the President in policy development is the National Security Council. Established by the National Security Act of 1947, the Council consists of the President, the Vice-President, the Secretary of State, the Secretary of Defense, and the Director of the Office of War Mobilization. The President, who presides, may issue standing or temporary invitations to other officers and agencies to attend sessions. The Council formulates national security policy for the President's consideration and serves as a channel for collective advice and information on matters of national security. In both the Truman and Eisenhower administrations the Council has played a leading part in development of policy. A further important policy staff unit of the Executive Office is the Council of Economic Advisers. Created by the Employment Act of 1946, it helps the President prepare his annual economic report to Congress, studies economic trends and recommends policies to the President.

The longest-established source of collective policy advice to the President is the Cabinet, which exists outside the Executive Office of the President. In 1793 Washington began the practice of bringing his department heads to-

gether for their joint advice, and each President since then has continued the practice. The Cabinet therefore functions entirely by presidential initiative and is, in the main, what the Chief Executive makes of it. Its usefulness has been highly uneven. Presidents such as Woodrow Wilson and Franklin Roosevelt utilized it very little. In the Truman and Eisenhower administrations important matters have been consistently referred to it.

Even so, we nowadays hear a good deal about relieving the President of his administrative burdens. The question raised is whether there are duties to the performance of which the President may be required to give his personal attention if they are to be validly performed. No one doubts that there are certain Constitutional duties of this description. In the words of Attorney General Cushing in 1855: "It may be presumed that he, *the man* discharging the Presidential office, *and he alone*, grants reprieves and pardons for offenses against the United States." And again:

"No act of Congress, no act even of the President himself, can, by Constitutional possibility authorize or create any military officer not subordinate to the President."[16]

Likewise, the President must commission all officers of the United States. This, indeed, President Taft found to be his heaviest "manual duty," and he congratulated himself on having such a short name. At the same time, the burden of this particular "manual duty" may be easily exaggerated. The term "officers" refers in the Court's vocabulary nowadays to fewer than one hundred thousand of more than two million appointees to civil posts in the national government.[17]

[16] 7 Opins, A. G. 453, 464-465 (1885).

[17] The leading case is *United States v. Germaine*, 99 U.S. 508 (1878). For further citations see *Auffmordt v. Hedden*, 137 U.S. 310 at 327 (1890).

It seems, moreover, to have been the belief of early Congresses that they could and ought to enlarge the "manual duties" of the President indefinitely. Thus he was required in Washington's time to sign all patents to land, all patents to inventions, all wills of Indians living on reservations; while each pardon had to be signed three times.

All such requirements have long since been scrapped except the last—the triple signature of pardons and the performance of this has been recently greatly facilitated.

Dealing with the question posed a moment ago, in 1843 in a case which grew out of a statutory provision expressly prohibiting the advancing of public money to the disbursing officers of the government except under the special direction of the President, the Court said:

> The President's duty in general requires his superintendence of the administration; yet this duty cannot require of him to become the administrative officer to every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform. This cannot be, 1st, Because if it were practicable, it would be to absorb the duties and responsibilities of the various departments of the government in the personal action of one chief executive officer. It cannot be, for the stronger reason, that it is impracticable—nay, impossible.[18]

And recent cases go farther. They recognize the implied constitutional power of the President to subdelegate his statutory duties to any subordinate agency authorized to receive them. Indeed Congress has increasingly provided specific authorization for his action in this regard; and when by oversight it has neglected to do so, it has made doubly sure by the simple expedient of ratifying such presidential action as has taken place. "The combined effect of the practice of the Congress, the courts, and the President" today is, in the words of the able writer we have been relying upon,

[18] *Williams v. United States,* 1 How. 290, 297 (1843).

"to make it very unlikely that any presidential subdelegation of statutory authority would be invalidated by the courts on the ground that the presidential duty was a personal one."[19]

Indeed, the question that arises nowadays is not whether the President can be relieved of his administrative duties but whether his duty to "take care that the laws be faithfully executed" has not been dangerously fragmented, or at least put in the way to being so.

For the rest, it may be seriously questioned whether relief of the President from his administrative burdens is such an important contribution to the problem of easing his burden as a whole as it has been assumed to be. As ex-President Hoover pointed out to Congress very recently, no fewer than four Presidents have suffered breakdowns in the last thirty-six years, Wilson, Harding, Franklin Roosevelt, and President Eisenhower; but it is certain that administrative burdens played a very minor part in the breakdown of the first three of these, and in particular in that of Wilson and that of Franklin D. Roosevelt. These were the product primarily of the strains of war and of our international position. How are these to be lessened? Whatever else may be said for or against it, Amendment XXII is certainly a contribution to this end; and the suggestion made below for a new type of Cabinet may be another. At least, it is offered as such.

Party Leader

The President, to put his programs into action, must work through the party machinery and apply the party whip. Unless he can establish and maintain himself as leader of his

[19] *See* Glendon A. Schubert, Jr., "Judicial Review of the Subdelegation of Presidential Power," 12 *Journal of Politics,* 668.

party, he invites the failure that has befallen certain Presidents who, although they brought considerable personal attainments to the office, fared badly in party matters. John Quincy Adams and John Tyler were both men of caliber whose careers were blighted because their parties got out of hand.

Party leadership has long been rejected, to be sure, as an acknowledged function of the President. Even President Eisenhower in the earlier part of his term shied away from party matters and delegated them to subordinates. But after the 1954 elections, which restored the Democrats to control of Congress, he saw the importance of the President's party role and proceeded eagerly to assume it.

As party leader the President stands atop a mechanism whose numerous parts are sprawled across a continent. Over some of them he has virtually complete control; over others very little. Among the latter are the local and state party groups that parallel their respective government units and encompass the professional politicians and others who derive much of their sustenance from the public trough. The numerous state and local organizations converge on various national groups and organizations, such as the National Committee, a loose alliance of state and local leaders that performs several important functions in connection with presidential elections. There are also the party organizations of the Senate and House: caucuses, steering committees, policy committees, and the like. These units, consisting of legislators whose chief affinities are with state and local organizations, consult on legislative agenda and policy and map strategy for congressional campaigns.

As party leader the President hand-picks the chairman of the National Committee and runs the national office as if it were his own organization. Most Presidents are able to

control the party machinery to the extent that they can ensure their own renomination or pick their successors. Mr. Truman, though, experienced no little difficulty in becoming his party's standard-bearer in 1948. New Dealers and city bosses engaged in open revolt, even to the point of inviting first General Eisenhower and then Justice William O. Douglas to be their candidate.

Most Presidents, on the other hand, have found it extremely difficult to rally their congressional party membership behind their programs. President Truman, despite his extraordinary victory in 1948, which restored the Democrats to power in both houses of Congress, was unable to obtain in the ensuing session the enactment of a single major element of his elaborate Fair Deal program. Even Franklin Roosevelt, with all his imposing political strength and consummate skill, had trouble with Congress except at the most intense period of the crisis produced by the depression. Thanks to this, his first term was in the main one of steady progress on firm ground, but in the second his legislative support caved in, most notably in the battles over his Supreme Court proposal, over administrative reorganization, and over wages and hours measures. In fact, he did not succeed in securing the enactment of any major New Deal legislation after the Fair Labor Standards Act of 1938.[20]

Thus the President as party leader, unlike the British Prime Minister, has no organization through which he can stabilize his impact on governmental policy-making. He has little in the way of controls — nothing even remotely approximating the power of the Prime Minister, who through the central party organization with its powers of selection and financing, can with few exceptions decide the fortunes of

[20] *See* James M. Burns, *Congress on Trial* (New York, 1949), 176 ff.

all candidates of his party standing for Commons. For the most part, the President has to make his way as best he can through the exertion of influence and pressures, and this is a matter of some delicacy. For the President must be ever watchful not to offend an ultrasensitive Congress and a suspicious public by actions that, on the flimsiest evidence, may be labeled "dictatorship."

Of the several pressures that the President can bring to bear on party members, one of the most ancient is patronage. Jefferson, Jackson, Lincoln, and Franklin Roosevelt were all wholesale dispensers of offices. The importance of patronage is that it enables a President to strike at a legislator in his home district. How patronage is used may attract or alienate local groups on whose support the legislator depends. Although the considerations involved in the use of patronage are seldom publicly aired, now and then the *quid pro quo* comes to light. Roosevelt's assistants, in handing out jobs, would first ask an interested Congressman what his vote was on various legislative measures sponsored by the administration.[21] President Truman, in a moment of exasperation in his futile efforts to secure the repeal of the Taft-Hartley Act in the 81st Congress, flatly warned that how Democratic legislators voted on that matter would be taken into account in the disposal of patronage.[22]

Yet, over the years, patronage in its net result has proved of limited value to the President. Roosevelt, to be sure, seems to have profited a good deal by postponing his appointments as long as possible, thereby keeping a club of expectancy suspended over the heads of legislators. The greatest weakness of patronage is that it is founded on the assumption of human gratitude, an assumption apt to encounter rough sledding

[21] *President, Office and Powers.* 505.
[22] *New York Times,* February 15, 1950.

in politics. President Taft came to the conclusion that every time he made an appointment he created "nine enemies and one ingrate." Moreover, the efficacy of patronage today is limited by the fact that the extension of the merit system has shrunk it to a mere shadow of its former self. When, for the first time in twenty years, the Republicans captured the Presidency in 1952 they found only a few thousand jobs available for party pap.

As party leader the President can exert a number of other influences in congressional elections, but the sum of them still falls far short of enabling him to build up a unified party devoted to a common program. One thing he may do is to intervene in his party's primaries and seek the nomination of candidates pledged to his support. Such an intervention was attempted on a major scale by Franklin Roosevelt in his ill-fated purge in 1938, when he publicly made known his preferences among the candidates in the primaries of South Carolina, Maryland, and Idaho. In each instance the President's démarche backfired. Ever since then Presidents have been chary of intervening in party primaries. Mr. Truman limited himself to his home congressional district, and President Eisenhower refrained from intervening at all.[23]

Nowadays, indeed, the President is expected as party leader to assist in the election of his party's candidates indiscriminately, including those whose election may be of

[23] It is also to be noted that the normal expectation is that the President will stand more or less idly by, even though his prestige may be very much at stake, in a primary fight between candidates clearly pledged to support or oppose his program. So it was, for instance, in the Democratic primaries of North Carolina during the Truman administration, when Frank Graham, a Fair Dealer and personal friend of the President, was defeated by Willis Smith campaigning for "real southern democracy." The President was little more than an onlooker while this defeat, certainly a damaging one to his prestige in the party, was in the making. *See New York Times,* June 25, 1950.

more harm to his program than the triumph of their opponents would be. In the 1954 congressional elections, for instance, President Eisenhower allowed himself to be photographed with over a hundred Republican candidates—a matter of obvious advantage in the local campaigns—and said that he would make speeches expounding his program if he happened to be in the area of a candidate who supported it and wished him to speak. Asked how he chose from among the legislators for bestowal of his photographic and rhetorical favors, the President acknowledged that there was "a little bit of a check" on the legislator's voting record. Seasoned observers among his listeners concluded, however, that there was very little likelihood of the President's withholding support from the most recalcitrant legislator in his party if the legislator asked support. In the ensuing campaign, no such instance came to light. The President, like most of his predecessors, placed loyalty to party above loyalty to program.[24]

Legislative Leader

Virtually all Presidents who have made a major impact on American history have done so in great degree as legislative leaders. Jackson's war on the Bank of the United States centered on a legislative struggle. Theodore Roosevelt's Square Deal, Woodrow Wilson's New Freedom, F. D. Roosevelt's New Deal, and President Truman's Fair Deal were essentially programs of legislation embracing many parts. Indeed, virtually all Presidents have been active in

[24] *See New York Times,* August 1, 1954, Sec. IV. Even the fact that in a presidential-congressional election year the President may sweep a number of legislators into office on his coattails may not engender any substantial increase of support in Congress. Truman's victory in 1948 may be cited.

legislation, including even Taft and Hoover, notwithstanding their dedication to conservative interpretations of presidential power.

Although Article II, section 3 of the Constitution provides that "He [the President] shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient," the presidency for the greater part of its history was operated on the assumption that leadership of the legislature was an extralegal encroachment on the principle of the Separation of Powers. Lincoln found it expedient to declare:

> By the Constitution, the Executive may recommend measures which he may think proper, and he may veto those he thinks improper, and it is supposed that he may add to these certain indirect influences to affect the action of Congress. My political education strongly inclines me against a very free use of any of these means by the executive to control the legislation of the country. As a rule, I think it better that Congress should originate as well as perfect its measures without external bias.[25]

Indeed, part of the novelty of the first Roosevelt's dramatic arrival on the presidential scene at the turn of the century was his forthright disclosure of his intention to assume legislative leadership. This should have occasioned no surprise, for as governor of New York he had functioned freely as legislative leader, admitting violation of the prevalent theory. As President he vigorously acted as he said he would, and in time he sought to impart legitimacy to his course by contending that his obligations to the legislature were transcended by his obligations to the people. As he put

[25] Quoted in Norman J. Small, *Some Presidential Interpretations of the Presidency* (Baltimore, 1932), 169. The views and practices of the pre-F.D.R. Presidents are conveniently summarized in this book. As for Lincoln, his assumption of the "war power" enabled him often to get what he wanted, Congress to the contrary notwithstanding.

the matter in his *Autobiography:* "In theory the Executive has nothing to do with legislation. In practice, as things now are, the Executive is or ought to be peculiarly representative of the people as a whole. As often as not the action of the Executive offers the only means by which the people can get the legislation they demand and ought to have.[26]

Although certain Presidents have willingly undertaken the tasks of legislative leadership, they have varied enormously in their effectiveness in this respect. Without doubt, the most successful of all was Thomas Jefferson, whose tactics were usually indirect, sometimes even furtive. He induced former colleagues to run for Congress in order to have a corps of sponsors for his meaures. Legislative committees were constituted strictly in accordance with his wishes. Messages that he prepared in Cabinet were forwarded to the committees of Congress by his Secretary of the Treasury, Albert Gallatin, the administration's watchdog and liaison in legislative matters. Jefferson supervised the progress of his measures in Congress at all stages until their enactment. Caucuses were held at his direction, sometimes under his chairmanship, and their frequency increased. Floor leaders, an invention of his administration, co-operated at every turn.

Among modern Presidents, Theodore Roosevelt must be credited with having staked the claim to presidential leadership in the legislative field, but his actual cultivation of the claim left much to be desired. His chosen vehicle was ordinarily the annual message setting forth a vast program of legislative activity. The document soon grew to inordinate length — more than 25,000 words on occasion! Dispatched by messengers to Capitol Hill to be read from the Speaker's desk by a droning clerk to a joint assembly of the two

[26] Quoted in Small, *Some Presidential Interpretations of the Presidency,* 11.

Houses, the bulky composition fell short of its intended effect on the Congress, to say nothing of the American public.

This pattern was shattered by Woodrow Wilson when, on April 8, 1913, reverting to the practice of the first two Presidents, he went before the Congress to deliver in person his first message, which was confined to tariff reform. He wished the members, he said, to bear witness through their own eyes that he was a real human being, "not a mere department of the Government hailing Congress from some isolated island of power," and assured them that he was to be their constant colleague in the great work of tariff reduction. One can readily imagine Colonel Roosevelt grinding his teeth in vexation at his own failure to have thought up that one. But of course, whereas T. R. was good enough in exhortation and harangue, Wilson was the most finished orator of his time.

From this time forth, the special message focused on a single issue was Wilson's chosen vehicle for his legislative interventions; and in this matter Franklin Roosevelt was his apt pupil. The first Agricultural Adjustment Act, the National Industrial Recovery Act, Court reform, Lend-Lease, and others of his leading measures were all advanced by this method. Mr. Truman's messages, on the other hand, have been criticized for dropping proposals in batches, thereby blunting their effect in the legislature and confusing the public. In his first major message to Congress following the surrender of Japan, for instance, he listed twenty-one points for legislative action. His typical State of the Union messages were similarly crammed with recommendations, and with very mixed results.

Meantime the short message has come to be supplemented by actual drafts of bills from the President's desk.

The first Roosevelt, who initiated the practice, was loath to admit the fact; Wilson felt it safe to be open and aboveboard. The Federal Reserve Act, his principal achievement in the domestic field, was largely the work of conferences at the White House. The second Roosevelt, again the sedulous ape, sent bill after bill to Congress in the first hundred days of the New Deal and regularly pursued the same technique later. In fact, certain acts of Congress invite this method of presidential leadership. Thus the Budget and Accounting Act of 1921 calls upon the President to submit each January an executive budget, which, with its accompanying message, constitutes a systematic and detailed statement of objectives and means for the guidance of the legislature. The Employment Act of 1946 calls for an Economic Report of the President, with such special reports as he desires to make. Under the terms of the Act the President is expected to recommend legislation and policies to foster free competitive enterprise and maintain employment, production, and purchasing power at maximum levels.

Still another legislative vent for presidential leadership is, of course, the power to veto acts of Congress, or to threaten to veto them. Early Presidents used the veto rarely, mainly to register objections on constitutional grounds; but Andrew Jackson made it a major weapon in his war on the Bank of the United States. Levi Woodbury, Jackson's Secretary of the Navy, was prompted to characterize the veto, as employed by his superior, as "the people's tribunative prerogative speaking again through their Executive." Among modern Presidents Franklin Roosevelt used the veto for matters both great and small. President Truman did likewise; among his more important vetoes were those of the Taft-Hartley Act of portal-to-portal pay, the offshore oil bill, and

tax reduction (twice). The Taft-Hartley and second tax reduction vetoes failed to stand.[27]

The general effectiveness of the veto as a presidential weapon is attested by the fact that from the first inauguration of George Washington to the second inauguration of Franklin D. Roosevelt only sixteen per cent of the vetoes of public bills were overridden. The significance of a veto may greatly exceed its momentary outcome. Used frequently, the veto keeps the legislators aware that they must reckon with the President, and it is with this consideration in mind that the second Roosevelt is reported to have said on occasion to his assistants in the Bureau of the Budget, to whom enacted legislation came directly from Congress: "Give me a bill that I can veto." In the age of the welfare state, the veto has also assumed importance as the vehicle of dramatic presidential appeals to the country at large. Mr. Truman's vetoes of leading measures of the Republican-controlled 80th Congress were framed for the public rather than for the legislators, and they were undoubtedly a factor in his victory in 1948.[28]

In the absence of an item veto some Presidents, in signing a bill, have simultaneously issued a statement of their objections to particular provisions and in so doing have offered guidance for Congress's future action. President Taft in 1910 signed an important rivers and harbors bill and sent Congress a memorandum pointing out the measure's

[27] On the veto in general, *see* E. Mason, *The Veto Power* (Boston, 1891) and Charles J. Zinn, *The Veto Power of the President* (Washington, 1951). Comment on the Truman vetoes is to be found in Bertram M. Gross, *The Legislative Struggle, A Study in Social Combat* (New York, 1953), 409.

[28] *See* Corwin, *Liberty Against Government* (Baton Rouge, 1948), 4, note 3.

defects and urging avoidance of them in future legislation. In 1947 President Truman was confronted with a rent control measure seriously inadequate by his own standards. The situation seemingly presented a perfect Hobson's choice. If the President vetoed, there would be no rent control whatever; if he signed, he ran the risk of censure by millions of tenants disgruntled by rises in their rent bills. After the manner of Taft, he signed the bill and communicated a message to Congress recounting its defects and calling for measures to relieve the housing shortage.[29]

A minor weapon in the President's legislative armory is his power to call Congress into special session and, in so doing, to specify the legislation on which he deems action necessary. Mr. Truman was unusually successful in exploiting the special session as a technique of leadership and of political dramatization. In a move that was probably unprecedented he declared in a fiery speech at the Democratic convention in Philadelphia, accepting the presidential nomination in July 1948, that he would call the Republican-controlled Congress into special session that very month to take action on, among other things, civil rights. His vigorous course and the contrasting inaction of Congress worked to his political profit in the ensuing election.

But the President, even with the most faithful application of his various techniques of legislative leadership, may still fail to get his program through Congress. Some Presidents, when faced with such frustration, have undertaken to appeal over the heads of Congress to the people, either on their programs as wholes or on specific issues. The first Roosevelt sometimes resorted to this device with impressive results. But Woodrow Wilson tragically illustrated its haz-

[29] Gross, *The Legislative Struggle*, 405.

ards when he appealed to the electorate in 1918 to return a Democratic Congress. His ensuing defeat shattered his leadership.

There are other less obvious means by which the President can assert leadership. Indeed, these may be of greater consequence than the foregoing more formal occasions of leadership. The President, for instance, can play an active personal part in the negotiations and compromises through which most legislation passes and in building up support. Theodore Roosevelt was especially effective in this capacity in his personal relations with the legislators. He conferred with them frequently, mixed with them socially, and kept under way a constant stimulating exchange of views. Many a time his magnetic personality converted opposition into support. Woodrow Wilson, on the whole, conferred less with legislators; he preferred to have their opinions in writing. Coolidge sent almost daily for emissaries from Capitol Hill to stop in at the White House to discuss some pending legislation. Mr. Truman assigned top-level assistants who held conferences in the office of the Secretary of the Senate to advance administration measures, and he himself frequently took part by telephone in the negotiations.[30]

A New Type of Cabinet?

The President, for all the variety of his associations with the legislators, has no continuously effective channel of communication with his party in Congress. He cannot regularly deal with the legislative members of his party as a group, but is driven to rely in large part on working through congressional leaders who may or may not co-operate in

[30] *See President, Office and Powers,* 321-30.

forwarding his objectives. Franklin Roosevelt had regular weekly meetings with the "Big Four" congressional leaders, a practice that the Truman administration continued. But the dealings of both Chief Executives, as well as those of President Eisenhower, had to weather a discouraging number of adversities. At one point Alben Barkley resigned as Senate majority leader in protest against Roosevelt's tactics. At least three of Mr. Truman's four legislative leaders were of conservative stripe and decidedly lukewarm, if not opposed, to the Fair Deal program. The Republican Senate leader in the Eisenhower administration, William F. Knowland, has vigorously opposed the President's foreign policy on the Far East, on the Bricker amendment, and on several issues raised by Senator McCarthy, and he has been openly critical of the President's party management.[31]

Altogether the President's various devices of legislative leadership provide him with, at best, highly uncertain means of obtaining the support of Congress. Illustrative is the legislative experience of President Truman's Fair Deal. Only a minor percentage of that many-itemed domestic program was enacted by the 79th and 80th Congresses, respectively under Democratic and Republican control. Then came the extraordinary victory in 1948, when Mr. Truman's prestige in the hour of triumph was compared with the peak days of his predecessor's enormous influence. He diligently proceeded to reassert his Fair Deal program in the Democratic 81st Congress, but the results, as in the past, were still extremely meager. Not only was the President defeated: Congress, in rejecting his measures, failed in most instances to offer substitute ones.

The experience of other presidencies could be cited to demonstrate the steady recalcitrance of Congress to presi-

[31] For examples *see New York Times*, November 5, 1954.

dential leadership. Save in periods of emergency the habit of Congress is to reject substantial portions of the President's proposals. Various explanations have been offered. Whereas the presidency is national in its orientation, Congress is essentially local. Its members depend for election on the support of a congressional district or of a state. The seniority rule in determining standing committee chairmanships brings to those posts legislators from safe constituencies, and they tend to be conservative in their outlook and unsympathetic to many items of a modern President's program. If, because of emergency, the President does succeed in pushing his policies for a spell, irritations and grievances rapidly accumulate and before long find their outlet in congressional opposition.

Faced with such roadblocks, the President may resort to any one of several extremes. He may, like Mr. Truman, advocate measures to Congress knowing that they stand little if any chance of enactment but that they are calculated to raise his own stock with various interest groups. A consequence of this behavior is to impart to his legislative program a certain air of irresponsibility and fantasy. Or the President, faced with actual or prospective defeat in Congress, may resort to autocratic measures designed to by-pass Congress. For example, Franklin Roosevelt, who had considerable difficulty in securing effective price control legislation in the Second World War, dispatched to Congress on September 7, 1942 a message that in effect demanded the repeal of a certain provision of the Emergency Price Control Act of 1942. If Congress did not act to repeal the provision by a specified date, Roosevelt said, he would treat the provision as repealed. The implications of this procedure are dealt with in the previous chapter. As there noted, it proved successful.

President Truman's seizure of the steel mills in the Korean war, also treated earlier, affords yet another example of presidential autocracy. This time, the Court having failed to back the President, he underwent a technical defeat. Even so, the full implication of the case is by no means unfavorable to presidential pretensions in time of stress.

In the opinion of some an occasional display of presidential autocracy is not a matter of great apprehension. Adequate safeguards, it is contended, automatically come into play in support of our democratic values and institutions. Operative are the Supreme Court, the undeniable pressure of public opinion, biennial elections, an alert press, the freedom of legislators to criticize, and a vast number of vocal private interest groups of a variety that embraces nearly every concern of society. Let the President make a misstep, and he incurs the wrath of one or more of these forces.

The difficulty of all these safeguards is that they do not get at the root of the most persistent cause of presidential autocracy, the recalcitrance and negativism that he encounters in his relations with Congress in time of crisis. Clearly necessary is the development of new political means that will bring about a closer, more effective working association between the executive and legislative branches.

The President's role as legislative and party leader has consequently long been a favorite focus of proposals to alter legislative-executive relations. As early as the 1860's Congressman George H. Pendleton of Ohio, reviving a suggestion made many years before by Story in his *Commentaries*, proposed that the Cabinet be given seats in Congress to strengthen the President's leadership there. The Cabinet members, like the territorial delegates, might claim the floor to speak, but might not vote. In succeeding years, Pendleton's proposal has been occasionally reintroduced,

most recently by Senator Kefauver. Its consistent defeat has been occasioned by the surmise that the Cabinet members might act independently and advance their own political fortunes at the expense of the President's—that the proposal would weaken rather than strengthen the presidency.

The Committee on Political Parties of the American Political Science Association, in its 1950 report, "Toward a More Responsible Two-party System," proposed to strengthen the President by centralizing party controls over finances, platforms, and the selection of national legislative candidates, in the manner of the British system. This arrangement might likewise result in the serious weakening of the President. If American parties were as hierarchical as the British, it is conceivable that the separation between the President and a Congress controlled by the other party would bring about almost complete paralysis of the government.[32]

Meantime, a midway proposal has been offered, looking to the establishment of a new type of Cabinet to consist of legislative leaders plus department heads and even the heads of independent commissions, as the business at hand may require. The legislative members of the Congress would derive from a Joint Legislative Council drawn from the two Houses and would be subject to change by them without notice.[33]

It is assumed that the presence of legislative members would terminate the practice of many Presidents of reducing the Cabinet to an organ that meets infrequently for merely formal and desultory discussions. Presidents have been able

[32] *See* the thoughtful discussion by William G. Carleton, "Our Congressional Elections: In Defense of the Traditional System," LXX *Political Science Quarterly*, 341.

[33] Facets of this proposal are discussed in *President, Office and Powers*, 361.

to treat their Cabinets casually because the political strength of the Chief Executive is normally vastly superior to that of the department heads. But legislators brought into a reconstituted Cabinet would not be dependent on the President, and they would have enough independent power to make the President value their support. The legislative leaders could be his important allies promoting in Congress the measures jointly developed in such a Cabinet. On the legislative members of this new kind of Cabinet it would devolve, first, to control presidential whim and, secondly, to provide the sort of consensus that is now lacking, though popular government inherently needs it, especially in an era of stress and uncertainty.

The proposed Cabinet should stem from what would amount to a compact between the President and Congress embodied in a statute. (A constitutional amendment would be both unnecessary and clumsy.) The President would pledge himself to choose a Cabinet in the manner previously described and to consult with it concerning all important problems of state before announcing his decisions; the Houses of Congress would pledge themselves so to shape their rules of procedure as to guarantee consideration of and action on all legislative proposals of the President within a reasonable time, whether the proposals had the approval of the Joint Legislative Council or not. The statute of agreement would have no legal force that would diminish the constitutional powers of either branch. Its status would be that of a gentlemen's agreement, and its binding effect, at the outset a moral one, would depend in the long run on the success of the arrangement.[34]

[34] For a more extensive discussion of this proposal *see* Edward S. Corwin, *A Constitution of Powers in a Secular* State (Charlottesville, 1951), 73–82.

Several objectives are intended to be achieved by the foregoing proposal. First and foremost, by maximizing the availability of the lawmaking power the occasions for autocratic courses and irresponsible pronouncements by the President would be minimized. Secondly, by putting the relationship of the President and congressional leaders on a popularly understood basis, the processes of compromise, vital in democratic government, would be enhanced, and the unnecessary, often detrimental, antagonisms between the branches would be reduced. Finally, the arrangement would provide an apparatus perfectly in accord with our federal democracy, for by joining legislators and President in policy-making it would unite representatives of both national and local interests.

Summary and Assessment

The presidency is a major means of social integration, an organ of leadership ideally suited to the peculiar needs of American society. Nowhere else in the world is there more cultural, economic, and geographical diversity than in the United States. An individual state—Massachusetts, New York, Texas, California, or another—has greater occupational, religious, national, and racial variety than most countries of Europe. Any serious presidential candidate, as we have seen, must appeal to a public exceedingly heterogeneous, sectionally and classwise. Only so can he hope to win.

But the President is not simply an integrator of the domestic public. America's position in the world, her preeminence in a system of global alliances to withstand Soviet communism, requires that he be able to rally the energies and convictions of peoples and governments everywhere. Indicative of the rise of this aspect of presidential leadership

is the fact that General Eisenhower is the first candidate whose claim to his party's nomination has rested almost exclusively on his prestige and his record in world affairs.

Presidential leadership has also been a major vehicle of social change. The President has been the chief propagator of the welfare state and a leading instrument of the transformation of American capitalism into a structure of big labor as well as big capital. It is to him, of all officialdom, that reformers and the oppressed have almost instinctively looked—the farmer crushed under heavy debt and sagging income, the impecunious aged, the unemployed. Our Presidents' commitment to the advancement of social justice is illuminated by the fact that since the New Deal neither major party has ventured to present a candidate who does not promise social betterment to a goodly number of groups that count politically.

Technology, as we have seen, has worked constant change in the methods of presidential leadership. The development of nation-wide press services, the radio, and now television give the President immediate access to an audience continental in size. Franklin Roosevelt, skilled in the media of his time, was enabled by the vast public support that he could muster to operate with a certain independence of Congress. On the other hand, the President or would-be President is in a sense the prisoner of his media. He must possess the relevant talent and acquire the necessary technique. Radio exalted the mellifluous voice. With television, what the President says is no longer the only thing that counts. Equally, perhaps more, important is how he looks when he says it. The selection of future Presidents will depend a good deal on how well their faces screen and how effectively they can assume an intimate living-room manner.

The President's role as party leader must be seen in its

relation to his role as leader of the public. Woodrow Wilson put the matter this way:

> In him [the President] are centered both opinion and party. He may stand, if he will, a little outside the party and insist as it were upon the general opinion. It is with the instinctive feeling that the country wants [such a man] that nominating conventions will often nominate men who are not their acknowledged leaders, but only such men as the country would like to see lead both its parties. The President may also, if he will, stand within the party counsels and use the advantage of his power and personal force to control its actual programs. He may be both the leader of his party and the leader of the nation, or he may be one or the other. If he lead the nation, his party can hardly resist him.[35]

The President's leadership of his party is, however, as we have seen, uncertain and uneven. Our parties are essentially decentralized organizations, highly sensitive to local wills. The party perforce brings into the legislature many men who will not go along with the President's program. Although they will not support the President, he is expected to support them. President Eisenhower is called on to back a Styles Bridges of New Hampshire or a Joe Meek of Illinois, even though both candidates as legislators would oppose much of his program.

Yet the President, for all his difficulties in securing legislative support, remains the most effective formulator and advocator of legislative programs. The Constitution and statutes provide him with opportunities that no one else has for leadership and the presentation of multiparty programs. Congress itself has added to this leadership by requesting the executive budget and the economic report. The President has weapons to make his leadership felt, such as the veto and patronage. He can tip the scales in the contested choices of majority or minority leaders. All these

[35] Quoted in Sidney Hyman, *The American President* (New York, 1954), 181.

devices, as history shows, must be used circumspectly, for they can disrupt as much as unify. Whenever a President has acted drastically, as by attempted purge, to build up a legislative party on whose support he can rely, his efforts have invariably been ill-fated. The Roosevelt purge not only resulted in the defeat of the President's candidates, but also hastened the Southern revolt. All other presidential purges in history have failed in their immediate objectives. Buchanan did not get the Lecompton constitution, Taft lost the election, Wilson was defeated on the League of Nations. The purge flies in the face of the traditional usage that makes the local party constituency the judge of who is a Republican and who a Democrat. Behind this system are the realities that developed and maintain it—the diversity, again, of American life.

But unfortunately these are not today the only realities that have to be considered. Already recourse has had to be had more than once in recent years to presidential action closely akin to dictatorship, and such situations, arising intermittently, are an ever-present possibility. What is the remedy, if Congress is not to be thrust gradually into a position of confirmed inferiority? The only solution—and that may not at all times be a sufficient one—is a closer working relationship between President and Congress, one capable of keeping legislative power an ever-available technique of government in both good times and bad times.

Chapter IV

Selection and Tenure

THE SELECTION of the President is a complex process based on federated party and governmental structures. The most visible paraphernalia of choice are the national conventions, whose tumultuous proceedings are nowadays televised, the popular balloting, the anonymous Electors, and the anti-climactic official count of the electoral vote, ordinarily by the President of the Senate, who, long after everyone knows, announces who the next President will be.

Viewed more realistically, election of the President is a formalized type of social struggle and of collective decision-making. It is not merely a struggle between candidates. It is a combat between groups and factions employing numerous mechanisms of power to shape the outcome: money, prestige, social position, economic relationships, business influence, the pressure of labor and other organized groups, technical political skill, party organization at all its levels. Presidential selection is a protracted process of gathering consensus over a quadrennial cycle, in which process the earlier phases may be more important than the final deals and decisions. It is a process by which social conflicts are brought to a head and resolved.[1]

[1] For the bearings of this point of view on specific presidential nominations, *see* Paul David, Malcolm Moos, and Ralph Goldman, *Presidential Nominating Politics in 1952* (Baltimore, 1954), Volume I, 20–21.

Finally, selection of the President is also governed at several stages by law. The federal Constitution specifies the requirements of age, citizenship, and residence of the President. It deals with his removal, death, resignation, or inability, his unavailability in certain other contingencies, the number of terms for which he is eligible. It establishes the Electoral College system to govern his selection and further methods of choice when that system is inconclusive. Federal statutes specify the date of election day, when the Electors are to meet and cast their ballots, and the procedure governing the eligibility and the counting of their ballots in Congress. A succession of statutes has dealt with the problem of succession to the presidency when both President and Vice-President are unavailable.

State laws, authorized by the federal Constitution, specify how the Electors are to be chosen and how the electoral vote of the state is to be cast. State laws also govern general electoral procedure and political activity within their borders.

Vicissitudes of the Electoral System

The electoral system has been used in forty-one elections. On three occasions the Electoral College has failed to elect a President: in 1800, 1824, and 1876. Twelve Presidents have been elected with only a plurality of the popular vote, the most recent instance being Mr. Truman in 1948. The history books generally say that three Presidents have been elected with fewer popular votes than their opponents: that John Quincy Adams thus triumphed over Jackson in 1824, Hayes over Tilden in 1876, and Harrison over Cleveland in 1888. Actually, two of these instances are subject to serious challenge. There is no way of proving that Jackson was the popular choice in 1824, because no popular votes were cast

that year in six of the twenty-four states. In the election of 1876 fraud and violence attended the popular polling in both North and South; Tilden's popular margin is, then, not above reproach.[2] The 1888 instance, however, cannot be controverted.

Ever since 1797 the method of electing the President has been a favorite object of political projecting. Since then there has been hardly a session of Congress that has not produced one or more amendments on the subject. In the first session of the 84th Congress nearly a dozen proposals were introduced.

The Electoral College—actually a congeries of colleges —was invented by the founding fathers to minimize popular influence in the selection of the President. The Electors were originally envisaged as sagacious nonpartisan figures who would apply their independent judgment to choosing the President. The conception was well received; the Electoral College system was hailed by Alexander Hamilton, in the midst of his battle to secure the ratification of the Constitution, as "almost the only part" of the document "which has escaped without censure." The future Secretary of the Treasury reflected the prevalent optimism of the founding fathers when he predicted: "The process of election affords a moral certainty that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications." [3]

The Electoral College worked substantially as planned during the first twelve years of the Constitution; yet even in that brief period a fundamental transformation occurred when, in 1796, Washington announced his unavailability for

[2] *See* P. L. Haworth, *The Hayes-Tilden Disputed Election* (New York, 1906).

[3] *The Federalist*, #67.

a third term. Party organizations began at once to blossom on a national scale, an eventuality that the founding fathers had not foreseen and, indeed, one that they would in all probability have sought to prevent. The Electors now became the automata of their respective parties in the selection of the President. When James Russell Lowell, a Republican Elector in the bitterly contested Hayes-Tilden election of 1876, was urged to vote for Tilden and thereby prevent a civil war, he replied:

> In my own judgment I have no choice, and am in honor bound to vote for Hayes, as the people expected me to do. They did not choose me because they had confidence in my judgment, but because they thought they knew what that judgment would be. If I had told them that I should vote for Tilden, they would never have nominated me. It is a plain question of trust.[4]

Lowell's reasoning is sustained by custom, legislation, and court opinion. State statutes on the subject range from those calling for party nomination of Electors, which of itself carries a presumption of pledged Electors, to those expressly requiring or clearly implying that Electors shall vote for the party nominees, regardless of personal preference. In 1952, in *Ray v. Blair*,[5] the Supreme Court gave sweeping approval to such arrangements, upholding a state statute that authorized the party organizations to fix the qualifications of candidates for nomination as electors. The Court pointed out that the statute simply made a legal obligation of what had been a long-standing practice.

The Electoral College system has been buffeted by other changes, many of them tending toward popular control. In the first three presidential elections the Electors were chosen in various ways, chiefly by the state legislatures. In 1824, however, electors were chosen by popular vote in all but six

[4] Quoted in Corwin, *The President, Office and Powers*, 51.
[5] 343 U.S. 214 (1952).

states, and in 1832 in all states but South Carolina, which persisted with legislative election until 1864.

Popular control has also been furthered by various revisions of the presidential ballot. One is the requirement, first adopted in Nebraska in 1917, that the Electors be voted for as a party group instead of individually. Another alteration requires the placing of the names of the presidential nominees on the ballot along with those of the Electors. The final step is the presidential short ballot, on which only the names of the presidential and vice-presidential nominees appear.[6] Each popular vote thus balloted counts for the Electors whose names, although unknown to the voters, are on file with the state secretary of state.

The major change, however, that has come about in the course of years in the manner of choosing Electors is the replacement of the district system by the general ticket system. Under the district system, widely practiced in the early days of the Constitution, the electoral vote of a state was allocated among districts specially created or already set up for congressional elections. Indeed this, according to Madison, is the system that the framers themselves desired. From it a divided electoral vote frequently resulted, usually on the same pattern as the vote for Representatives. In time, however, a particular party, having gained control in a state, endeavored to avoid the division of its electoral strength by introducing what became known as the general ticket system, under which the party carrying the state, by however small a plurality, obtains all the state's Electors and the minority party or parties none. The general ticket system has been

[6] *See* Spencer D. Albright, "The Presidential Short Ballot," 34 *American Political Science Review,* 955, and Clarence Berdahl, "Presidential Selection and Democratic Government," 11 *The Journal of Politics,* 23.

widely used for over a century. By 1828 only four states were using the district system, in 1836 none. Since 1836 the solitary reversion from the general ticket to the district system occurred in Michigan near the close of the century. The underdog party installed it for the 1892 election after unexpectedly securing temporary control of the state legislature two years earlier.

The general ticket system does not invariably work in the interest of popular control. In the Solid South it has fostered the development of the one-party system. In many states of that section the Republican party, faced with a hopeless minority position and the general ticket system, has scarcely maintained an organization. The system also causes party campaigning to be concentrated in doubtful states and in states with a substantial electoral vote. New York, New Jersey, and Michigan regularly attract a far greater share of the party's financial outlay and rhetorical fervor than such safe states as Maine, Nevada, or Georgia. Equally important, if not more so, is the elaborate concentration of effort that the general ticket system fosters on groups of voters whose party allegiance is pliable and whose votes are strong enough to swing a state with a substantial bloc of electoral votes. Another criticism of the general ticket system is that it often brings about the disfranchisement of a substantial minority of popular votes. Hughes in 1916 carried Minnesota by a popular plurality of only 359, but received all 12 electoral votes of the state. On a national scale, in the election of 1924 John W. Davis received 6,000,000 popular votes that brought him no electoral votes at all, whereas 2,000,000 others brought him 136. Finally, the general ticket system is attacked as sometimes resulting in the election of minority Presidents—those who have received an electoral majority without receiving a popular majority. A baker's

dozen of Presidents have been so elected, among them Truman in 1948, Wilson in 1912, Harrison in 1888, and Lincoln in 1860. In the light of this history a committee of the House of Representatives once sweepingly condemned the system as "not fair, honest, accurate, certain, or democratic."

The Idea of a Presidential Primary

It is in revolt against these abuses that the Presidential primary has been suggested to put nominations for President and Vice-President more directly into the hands of the people. The idea has had a checkered history since its inception in Wisconsin in 1905. The primary was used in twelve states in 1912, reached a peak of twenty-three in 1924, and declined to eighteen in 1952. Since then interest has been stirring in several states. Indiana and Nevada have enacted presidential primary laws since 1952, and three others are considering proposals to be acted on before 1956.[7]

The presidential primary has been thus far a local institution with considerable divergence of practice, and it has sometimes enhanced, sometimes minimized popular control. In the eighteen presidential primaries held in 1952 three main types of practice are discernible. The first, in six states (New York, Pennsylvania, West Virginia, Alabama, Illinois, and Nebraska), provided essentially for the direct election of unpledged delegates. The second, in four states (Wisconsin, Minnesota, South Dakota, and California), provided a ballot on which the voter was given an opportunity, by making a single mark, to vote simultaneously for a presidential candidate and for a slate of delegates committed to that candi-

[7] The role of the presidential primary in the 1952 campaign is conveniently summarized in David *et al., Presidential Nominating Politics in 1952,* Volume I. *See* especially 5 ff., 51 ff., and 173 ff.

date. The third, of four states (New Hampshire, Massachusetts, New Jersey, and Florida) with intermediate systems, provided for the direct election of individual delegates, who in some circumstances could indicate their presidential preferences on the ballot. The remaining primaries, those in Maryland, Ohio, Oregon, and the District of Columbia, vary markedly in practice and defy classification.

The impact of the primary system as a vehicle of popular control has been extremely limited. At no convention thus far has the number of pledged delegates amounted to the majority required to nominate. The number of pledged delegates is, however, often substantial. The Republican convention of 1920 had 455 instructed or pledged delegates out of a total of 984. In the Democratic convention of 1924 there were 616 instructed delegates, although considerably fewer than two thirds, the number then required to nominate. Popular control is also handicapped by the favorite-son device, which may serve to keep delegates from a more serious candidate. The favorite son is usually a leading citizen or politician, and the bloc of votes that he controls in his own and possibly other states may contribute to the development of a convention deadlock and can later be used for trading purposes.

Among other weaknesses of the primaries is the fact that they are scheduled over a long interval in which considerable shifts of public sentiment may impair the validity of the earlier primaries. In 1952 primaries ranged from January 29, the closing date for filing in New Hampshire, to June 17, when the District of Columbia primary was held. Primaries may also be a heavy additional expense to the candidate, even a prohibitive one should he wish to compete in many states. The financial factor is well illustrated by comparing Harold Stassen's primary campaigns in the last two presi-

dential elections. Not so well financed in 1952 as in 1948, Stassen did not travel in a chartered plane from state to state as in 1948, but rode a regular commercial airliner. In 1952 he could afford television time only at 11:15 P.M., at about half the cost of the time between 6 and 11. For various causes, among them financial, Stassen had only twenty-five delegates on the first ballot in 1952. In 1948 he had had 150.

Primaries attract, at best, exceedingly uneven participation by the candidates. Most will not enter the lists except in states where they are confident of victory. Strong candidates tend to stand consistently aloof: they have much to lose and little to gain. The relative futility of the presidential primary is illustrated by the fortunes of Senator Kefauver in 1952. He came into the Democratic convention with by far the largest number of committed delegates, 257½, but 161 of these had been won in states where he had no active opponent of presidential stature. He had won all of his primary contests except two of the four in which a genuine candidate for President opposed him.

For all these drawbacks, proposals have been recurrent to establish a national primary for the nomination of the President and the Vice-President. In the 84th Congress Senators Smathers, Kefauver, and Langer all introduced constitutional amendments to this end. But quite apart from the difficulties peculiar to each of these plans, serious objections can be offered to the whole idea of a national Presidential primary. One is the expense, which would be great enough to throttle the aspirations of many if not most would-be candidates. It is estimated that in 1952 the two major parties, made a combined expenditure of $85,000,000 in the presidential campaign. The national primary would drive candidates even deeper into the exacting arms of their financial backers, for the age of television has

skyrocketed the cost of political campaigning. Indeed, the national primary, instead of being a democratic device, would be antidemocratic, because it would limit candidatures to those few who could command the big money required to campaign. Equally serious is the prospect that a national primary would have a devastating impact on party cohesion. The primary would serve to organize rivalry and strife between party personages on a national and thoroughly publicized scale. The consequence might well be splits within the parties that could not be healed within a single presidential term.

Reform of the Electoral System

Of recent proposals for the reform of the Electoral System, the best advertised currently is the Lodge-Gossett plan, with its twin in the 84th Congress, the Daniel-Humphrey resolution.[8] The plan, as introduced in the 84th Congress, calls for the abolition of the Electoral College, but the electoral vote of each state is still retained, to be divided among the several candidates for President in proportion to the popular vote cast for each within a given state. The fractions involved would be carried to three decimal places. The candidate having the greatest number of electoral votes would be President if that number were at least forty per cent of the electoral vote. If it were not, the Senate and the House, sitting in joint session, would choose the President from the two candidates with the most electoral votes.

Various claims have been made for the Lodge-Gossett, Daniel-Humphrey proposal. (1) It would give proper weight to the minority vote cast in each state by accurately reflecting that vote in the electoral vote. Former Senator Lodge holds

[8] S. J. Res. 31, 84th Congress, 1st session (1955).

that under the present system votes cast for the losing candidate in a given state are "of no more effect than if they never had been cast." Under the proposed plan, he maintains, every popular vote would count, since what are now wholly unused blocs of votes would be carried over into other states and added to other votes. Public opinion, it is maintained, would be more accurately mirrored in presidential elections, and popular interest and participation would be heightened in all states. Under present procedures activity fluctuates widely from great intensity in pivotal or doubtful states to total neglect in sure and small states. (2) The plan would abolish the evil of the one-party state. (3) It would overcome the tendency of the present unit rule to focus a disproportionate amount of political attention on local blocs. (4) The plan would preclude the danger, sometimes realized under present practice, that the candidate receiving a minority of the popular vote will receive a majority of the electoral vote. (5) The plan harmonizes with the structure of our federal democracy by protecting the interests of the small states and observing the principle of the equality of the states in the Senate. In sum, as Mr. Lodge has put it, the plan claims to be "fair, accurate, and democratic." [9]

Such are the claims. Most of them can be countered with important if not overriding arguments. For the Lodge-Gossett proposal clearly implies a drastic and undesirable revision of the form and spirit of our two-party system. It seriously increases, rather than reduces, some of the very evils at which it is directed. (1) The proposal would foster the development of minor parties and in time weaken or destroy the two-party system. The constituency of the presidential candidate would cease to be primarily geographical and become primarily mathematical, for groups rather than areas

[9] Mr. Lodge's views are set forth in 28 *Congressional Digest,* 200.

would be the focus of his appeal. The candidate's approach would also inevitably change, and for the worse. The present geographical constituency has required the office seeker to be of moderate views, carefully balanced among the sundry blocs of opinion in his constituency. If the constituency became mathematical, as under the Lodge-Gossett plan, the candidate must almost necessarily be an extremist, willing to subordinate himself to the particular splinter of national opinion whose support he invites.[10] (2) The proposal, by virtue of its tendency to multiply parties, would increase rather than reduce the danger of electing minority Presidents; minority Presidents might become the rule. (3) The wasted-vote argument appears specious in the light of the Lodge proposal that a forty per cent electoral vote be sufficient to elect. It can be argued with equal validity that the remaining sixty per cent of the vote, scattered among several parties, would constitute an even more serious waste. (4) In only a limited sense is the proposal preservative of the federal system; its method of computing the popular and electoral vote is actually a step toward the obliteration of state lines.

Another type of proposal urges that the general ticket system be replaced by an adaptation of the district system, which, as we saw, was widely employed at the outset of government under the Constitution. Senator Smith of New Jersey sponsored such a plan in the 84th Congress.[11] Each state, under his proposal, would be divided by the state legislature into districts equal to the number of Representatives to which the state is entitled in Congress. In addition two electors would be chosen by popular vote from the state at large. Each district would consist of continuous and com-

[10] For an extended analysis, *see* Lucius Wilmerding, Jr., "Reform of the Electoral System," XLIII *Political Science Quarterly,* 1.

[11] S. J. Res. 59, 84th Congress, 1st session (1955).

pact territory and would contain, as nearly as is practicable, an equal number of inhabitants. The voters of each district would choose two electors, who in turn would vote for President and Vice-President. The candidate having the greatest number of votes, if the number were at least forty per cent of the whole number of electors, would be deemed elected. If this requirement were not satisfied, the President would be chosen by a joint meeting of the House and Senate. The resolution does not specify whether the legislative voting is to be per capita or by state.

The attraction of the district system, as against the Lodge proposal, is that it retains the geographic constituency and its advantages. In essence the district system gives equal voice to equal geographic units of the population rather than to equal aggregations of actual voters. Under it all units would be equal in electoral votes, even though the turnout of voters might vary from district to district. One difficulty of the district system is its susceptibility to gerrymandering. Senator Smith seeks to deal with this by closely specifying in the constitutional amendment the make-up of the district and by prohibiting the alteration of an established district before the next census.

Another frequently offered proposal calls for the total abolition of the Electoral College System and the replacement of it by the election of President and Vice-President by a nation-wide popular vote. In the 84th Congress Senator Humphrey, all by himself this time, introduced a proposal based on the greatest number of popular votes, "if such number be at least forty per centum of the whole number of votes cast for President." If this requirement were not satisfied, the House of Representatives would elect, with each member having one vote.[12]

[12] S. J. Res. 53, 84th Congress, 1st session (1955).

Senator Humphrey leaves it to the states to determine the qualifications of the voter. The structure of his plan is such that it would be to the self-interest of each state to throw as many voters into the fray as possible. It is conceivable that the country might wind up with a twelve-year-old electorate and that nonvoting would become a new form of juvenile delinquency. The Humphrey proposal would substitute a mathematical constituency,with the evils already cited, for the present geographic constituency. It would also pose a difficult problem of policing. It would be no small task for the national government, which would administer the election, to get an honest and accurate count of the millions of voters in a country-wide election.[13]

Above all, the Humphrey proposal runs afoul of the practical difficulty that no plan can make much progress unless it is adapted to the federal arrangement. The less populous states will object, and with fatal effect, if their advantages under the present set-up are put in jeopardy. Federalism suffuses our system of presidential selection. The senatorial representation in the electoral vote takes care of the federal principle of equality among the states. The remaining congressional representation allows for equitable apportionment among the states—the federal principle again —according to population distribution. If the electoral vote is inconclusive, the President is chosen in the House of Representatives, voting—in deference to federalism—by states. This last feature of the present system undoubtedly goes too far. That Nevada should in any contingency have the same weight in the choice of a President as New York is absurd on the face of it. The vote should be per capita.

[13] *See* E. S. Corwin's communication to *New York Times,* June 27, 1955.

Succession to the Presidency

The central provision of the Constitution dealing with presidential succession is Article II, section 1, paragraph 6:

> In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

Neither this nor any other provision of the Constitution answers these questions: Who is authorized to say whether a President is unable to discharge the powers and duties of his office? When he is unable to do so, does the office become vacant? To what does the Vice-President succeed when the President is disabled, or is removed, or has died—to the "powers and duties of the said office," or to the office itself? Or does he succeed to the powers and duties when the President is disabled, and to the office when the President has permanently departed the scene? What is the election referred to in the last clause of the quoted language?—the next regular presidential election or a special election to be called by Congress?

On several occasions Presidents have been unable to discharge their official duties for extended periods. President Garfield was thus disabled from July 2, 1881, when he was fatally shot, until his death the following September 19. President Wilson was disabled for many weeks following his collapse on September 26, 1919. The question of disability never arose for Franklin Roosevelt, whose illness was not so dramatic or so prolonged as Wilson's. Yet there is impressive evidence that he was a very sick man in the last months of his life. His trusted secretary, William D. Hassett,

has written that he "had started to weaken at least a year before his death" and that it was clear before the fourth-term nomination that "the boss was leaving us." A study of the Yalta papers shows F.D.R. so far short of his normal vigor that he had left undone much of his homework and failed to gain the mastery of the essential briefing papers without which a negotiator is at the mercy of a hard bargainer; that his top advisers had difficulty in seeing him and getting his attention for what they had to say and what he needed to know; and that he showed lack of vigor, zest, and sustained concentration in the Yalta discussions.[14]

On September 24, 1955, the problem of presidential disability was again thrust to the fore when President Eisenhower suffered, entirely without warning, a coronary thrombosis.

Every such crisis from the twentieth President to the thirty-third has prompted discussion of the President's disability and particularly of the intricate question: Who is to determine his inability? Some contend that the Vice-President should do so, since, if inability exists, he must act. Actually, for neither Garfield nor Wilson did Congress or the Vice-President act. In both instances the official powers and duties of the disabled President were left to be discharged in such manner and by such devices as his immediate family and personal entourage managed to contrive.

The mishap to President Eisenhower differs in several important respects from these previous instances. His disability was not so complete or so prolonged; after only four days he was able to initial papers, an act symbolic of his ability to discharge necessary duties. Fortunately the crisis came at a time of abnormal inactivity in government business,

[14] These matters are treated in Neil Hurley, "Government by Proxy," *America* (October 22, 1955), 98.

whereas Wilson was stricken in the midst of the great debate over the Versailles treaty and the League of Nations. And President Eisenhower's trouble, unlike the illnesses of Wilson and Roosevelt which were shrouded in the utmost secrecy, was handled with an exceptional candor that precluded rumor and unwarranted public alarm.

Nevertheless, the potential for political disaster of the President's heart attack was great and is hardly to be overlooked. The Chief Executive, whose immense prestige had held together the diverse and conflicting elements of the Republican party, was suddenly isolated from the organs of leadership and command. He appeared to be automatically out of the running for a second term. Within both his executive family and his party were many would-be successors, none with a clear lead in the field. The White House was beset by rumblings against the Benson farm program.

But the crisis was weathered with extraordinary success, thanks to a staff, a Cabinet, and a Vice-President capable of proceeding with good sense and evident co-operation under their own momentum. The commanding role in the administration team belonged, however, to the Assistant to the President, Sherman Adams, who presides over a staff system, with documents working up from one level to another to a chief of staff. This system, the outcome of General Eisenhower's military experience, lodged great power in one man. That man was appointed to his post solely by the President, and his duties rested on only the most general statutory authorization: yet his impact on the presidency in the prolonged period of the President's disability was greater than that of any elective official. This arrangement, to say the least, is hardly in accord with the precepts of democracy, and to argue that it worked well in 1955 hardly justifies re-

liance on it as a suitable pattern for similar situations in future presidencies.

The fact is that the founding fathers left the problem of disability hanging in the air, thereby in effect relegating the direction of affairs under a disabled President to a Tumulty, a Mrs. Wilson, or a Sherman Adams—individuals, to be sure, whose abilities are somewhat disparate. It is submitted that a far more rational course would be to recognize the problem of disability as one for which the new type of Cabinet suggested in the previous chapter would be well suited. Such a Cabinet, drawn from the Executive and Congress, would be qualified by its breadth of membership to exercise authority (which Congress should vest in it), to determine when the President is disabled and thus to empower the Vice-President to take over until the President is able to resume office. Such a body, by virtue of its size and its closeness to the President, could be relied on to act with due regard to his interests. In addition Congress would do well to declare its sense that anyone acting as President because of a living President's inability does so only until the inability is removed. Some of the reluctance to deal with the problem of inability more conclusively has doubtlessly stemmed from fears of the disabled President's supporters that the Vice-President would supersede him for the entire remainder of his term.

Pursuant to its power to provide for the lack of both a President and a Vice-President, Congress has passed three presidential succession acts. Together these acts show Congress as vacillating between the Cabinet and the chief officers of the legislature in determining the precedence of succession. The Act of 1792 provided for the succession first of the President pro tempore of the Senate and then of the Speaker, who were to hold office only until a new President could be

chosen for another four years. The Act of January 19, 1886 provided for the succession of members of the Cabinet in order of the establishment of their respective offices, provided that the incumbent possessed the constitutional qualifications for the presidency. The third act, the Presidential Succession Act of 1947, is currently in force. It reverts to the pattern of the Act of 1792 with modifications. The 1947 Act names the Speaker and the President pro tempore of the Senate, in that order, to succeed to the presidency after the Vice-President. Impetus for the 1947 Act was given by President Truman's belief that the President should not have the power to appoint his successor if the office could be filled by an elective officer; and of all elective officers, he argued, "the Speaker is the official in the federal government whose election next to that of the President and Vice-President can be most accurately said to stem from the people themselves." President Truman's proposal also included a provision that an election ought to be held as soon as possible "to fill out the unexpired term," but this provision was rejected by Congress.[15]

The Act of 1947 provides for vacancies by reason not only "of death, resignation, removal from office, inability," but also by reason of the "failure to qualify" of the President-elect and the Vice-President-elect, an addition intended to implement the Twentieth Amendment. Those who succeed in these circumstances come to act as President and must at once resign the post by virtue of which they succeed. If it is the Speaker who succeeds, he must also resign as Representative in Congress.

An officer who comes to act as President is to serve for

[15] For extended discussion, *see* Joseph E. Kallenbach, "The New Presidential Succession Act." XLI *American Political Science Review,* 931.

the remainder of the current presidential term except (1) when he is acting because of the failure of a President-elect or of a Vice-President-elect who subsequently qualifies; the acting President is then to be supplanted at once; and (2) when the Speaker or President pro tempore has become acting President because of the disability of an elected incumbent, in which event the removal of the disability will result in the displacement of the acting President by the elected incumbent.

The Act of 1947 is open to certain criticisms. Although the Speaker may stem from the people, it is only from the people of one out of 435 Congressional districts. The caliber of our Speakers, in the main, has been somewhat below what the presidency requires and deserves. If Speakers are compared with our Secretaries of State, the result is decidedly in favor of the Secretaries. Speakers derive from sure districts, which are less likely to produce superior men than a close district. The Act of 1947 is also subject to possible objections of unconstitutionality as contravening the Separation of Powers.

What Congress should have done is reasonably clear. For vacancies occurring in the second half of a presidential term the Act of 1886 was adequate. For vacancies occurring in the first half of the term Congress should provide for a regular presidential election at the time of the mid-term Congressional election. This arrangement would preserve intact the assumption of the Constitution that the terms of a new President, a new House of Representatives, and one third of the Senate should start together; and it would at the same time reduce to its proper dimensions the question of what officer shall act as President when both President and Vice-President are lacking.[16]

[16] *President, Office and Powers,* 68–71.

The Twentieth Amendment also seeks to prevent certain types of vacancy from arising in the presidential office. The relevant provisions are:

Section III

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice-President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice-President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President-elect nor a Vice-President elect shall have qualified, declaring who shall then act as President or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice-President shall have qualified.

Section IV

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice-President whenever the right of choice shall have devolved upon them.

The Vice-President

One of the best ways to become President is to become Vice-President first. Since 1865 five Presidents have died in office, three of them the victims of assassins; and three—Wilson, Franklin Roosevelt, and Eisenhower—have succumbed to illness that rendered them unable to carry on their duties for a limited time. Since the establishment of the Constitution seven Vice-Presidents have succeeded to the presidency through the death of the President. For more than a century the country has not had as many as four Presidents in succession without having one who was originally

elected as Vice-President. The office of President has been filled between one quarter and one third of the time during that period by persons who were originally elected as Vice-Presidents.[17]

The vice-presidency has long been a favorite object of jest even by its incumbents. John Adams, the first Vice-President, characterized his post as "the most insignificant office that ever the invention of man contrived or his imagination conceived." Vice-President Marshall, in the Wilson administration, compared his office to "a man in a cataleptic fit. He is conscious of all that goes on but has no part in it." Even the founding fathers seem to have treated the vice-presidency as something of an afterthought. The office was devised at a week-end conference only a few days before the Constitution was signed and the Convention adjourned.

The founding fathers, however, saw the vice-presidency as something quite different from what it eventually became. The office was to be filled by an incumbent with all the qualifications of a Chief Executive, since it was to go to the runner-up in the electoral vote for President. In consequence the vice-presidency got off to a promising start under John Adams and Thomas Jefferson. But then came the Twelfth Amendment, prompted by the Jefferson-Burr contest of 1800, which nearly put Burr in the White House. The Amendment established the procedure observed today: instead of choosing between individual candidates, Electors choose between two slates, each containing a presidential and a vice-presidential candidate.

The vice-presidency went into an immediate decline.

[17] Convenient resumés of the vice-presidency are to be found in Irving G. Williams, *The American Vice Presidency* (Garden City, 1954), and James M. Burns, "A New Look at the Vice Presidency," *New York Times Magazine,* October 9. 1955.

The practice developed that still prevails, of choosing the Vice-President for political reasons rather than for intrinsic merit. He is expected to "bring balance to the ticket"; that is to say, to win votes. Sometimes this practice results in Presidents and Vice-Presidents of sharp philosophical and policy divergence, as witness Harrison and Tyler, Roosevelt and Garner. Time and time again it has caused the vice-presidency to pass to men whose impact on history has been practically zero. All but forgotten today are Daniel D. Tompkins, George M. Dallas, Henry Wilson, and William A. Wheeler.

In the twentieth century, fortunately, the vice-presidency has undergone something of a recrudescence. Three of its incumbents who succeeded to the presidency by virtue of the President's death went on to win the office on their own. Theodore Roosevelt did so in 1904, and Calvin Coolidge and Harry S. Truman repeated the feat. Recent Presidents, moreover, have consistently sought to make better use of the vice-presidency. In part, the President has been driven to this expedient by the great increase of his responsibilities and the necessity of using all available assistance. Franklin Roosevelt employed the talents of John N. Garner, at least in the early stages of the New Deal, to push his program through Congress. Henry A. Wallace took on important administrative duties in the Second World War. During Alben Barkley's tenure in the Truman administration the Vice-President was made by statute a member of the National Security Council and thereby became a participant in the most important and secret policy matters. Roosevelt and Truman both regularly invited the Vice-President to Cabinet meetings.

It was however, not until the Eisenhower administration that the vice-presidency, with the President's full encourage-

ment, reached its maximum importance in modern times. In the President's absence Vice-President Nixon presided over the Cabinet and the National Security Council, thus outranking the department secretaries. He was also at the forefront of party management. He set the tone and the themes of the 1954 Republican Congressional campaign and took on many speaking responsibilities ordinarily expected of the President. In legislative matters he became a leading adviser and negotiator for the Executive. He made several important good will trips to Asia and Latin America. In the illness of President Eisenhower he continued to preside over the Cabinet and the National Security Council and to handle ceremonial functions.[18]

President Eisenhower's temporary inability stepped up efforts to strengthen the vice-presidency. Voters and party conventions were exhorted to reinvoke the original expectation of the founding fathers that men fully qualified for the presidency would be selected for Vice-President. Proposals were in the offing for the 85th Congress to equip the Vice-President with such appurtenances as an official residence, more staff, and better office space.[19] President Eisenhower, who perhaps gave more thought than any recent President to the vice-presidency, asserted before his illnes that for the next administration the National Convention should choose the Vice-President primarily for his acceptability to the President as a close working partner. Indeed, in 1952 he had made a list of five or six names who fitted his standards, one of them Nixon's. Mr. Eisenhower even believed that a presidential

[18] *See New York Times,* October 7, 1955 and Roscoe Drummond's comments, "Presidency without the President," *New York Herald Tribune,* October 2, 1955.

[19] *See New York Times,* October 4, 1955.

nominee should step aside if the Convention did not abide by his preferences.

Limitations on Tenure

The tenure of the President has been limited by custom and the Constitution. Both types of limitation derive from the hostility, prevalent since the days of the Revolution, to long continuance in office, particularly for the executive. Seven of the original state constitutions, all antedating the federal Constitution, contained provisions curtailing the re-eligibility of the chief executive. That no similar provision appeared in the federal Constitution is attributable to the general expectation that the venerated Washington would become the first President and would serve indefinitely.[20]

Washingon not only upset this expectation: his example also served to limit future Presidents to two terms. Although Washington apparently had no thought of making a precedent, Jefferson, in announcing his decision to withdraw after a second term, stressed the first President's example and the principle of rotation in office. Indefinite re-eligibility, Jefferson contended, would extend the office, although it was "nominally elective," "in fact for life" and make it "degenerate into an inheritance." Madison, Monroe, and Jackson all fortified the antithird-term tradition. Indeed, Jackson repeatedly urged the adoption of a constitutional amendment limiting the President to a single term of four or six years.

The span from Jackson to Lincoln saw something akin to a one-term tradition develop. No President in seven full presidential terms from Jackson to Lincoln was able to win re-election. Only one, Van Buren won renomination. William

[20] *President, Office and Powers,* 43 ff.

Henry Harrison in his inaugural address pledged himself to one term only, and the Whig platform of 1844 endorsed the one-term principle. Most amendments introduced in Congress from 1825 to 1860, dealing with presidential tenure, were similarly directed.

Lincoln's re-election ended the emerging one-term tradition, and the talk of Grant for a third term seemed about to topple the two-term tradition. Among modern Presidents the no-third-term principle has run a wavering and uncertain course. Although Theodore Roosevelt vigorously voiced his support of it after the 1904 election, he wriggled free to run in 1912. He "clarified" the custom as applying only to "a third consecutive term." It appears that Woodrow Wilson, if his health had permitted, would have sought a third term in 1920 and that Coolidge was not averse to a draft in 1928.[21] It remained for Franklin Roosevelt to shatter the tradition in 1940 and again in 1944.

Where custom has failed, the amending process has taken over. In 1951 the Twenty-second Amendment was adopted with the proviso that no person shall be eligible for a third term as President if he has served two full elective terms or one full elective term plus more than one half of another term through succession to the office. The Amendment is designed, then, to settle any future confusion like that produced by Theodore Roosevelt and Coolidge. The Amendment is in contrast to comparable provisions of state constitutions in that it imposes a permanent ineligibility on any individual who has occupied the presidency for the allotted time.

[21] Concerning Wilson and his intentions, *see* Rixey Smith, *Carter Glass, a Biography* (New York, 1939), 205–6. On Coolidge, *see* Irwin H. Hoover, *Forty-two Years in the White House* (New York, 1934), 166–80.

The Amendment has been subject to various objections, and justly so. For one thing, it ignores the real issue: whether a President should be permitted to succeed himself at all. With the presidency a killing job occupied by men who have passed the peak of their physical vigor, and with the telling examples of Franklin Roosevelt and Eisenhower, few Presidents are likely to seek a third term. The real question would appear to be whether any President should seek a second term—whether an untried incumbent is preferable to a tired incumbent. Also, the chief objection to a third term applies equally to a second term; namely, that a President looking forward to re-election will evaluate all political questions primarily for their probable effect on his political fortunes and will be expected and required by his party to do so. Conversely, the Amendment will handicap the future President by posing an absolute terminal point of his service. It has been repeatedly found that, once the end of an incumbent's tenure is definitely known, his influence in Congress dwindles and his programs come to a standstill, for he is no longer to be feared. Finally, and perhaps most important of all, there is the possibility that the Twenty-second Amendment will promote a false sense of security that may at times hinder the development of those safeguards in which protection against an overweening Executive really lies.

The Constitution also provides for the termination of the President's tenure through the process of impeachment as follows: "The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." Only one President has been exposed to this procedure. In 1868 Andrew Johnson came within one vote of being convicted on charges based

chiefly on open violations of a Tenure of Office Act passed over his veto in 1867 and later held unconstitutional.

Transition between Presidencies

A modern President-elect must establish a rapport with his future office before he takes it over. The outgoing President has undertaken commitments and has policies in progress that, in the general interest, should be known to his successor. Transition is particularly important in the modern presidency, thanks to the heightened volume and importance of foreign affairs, the country's membership in several military alliances, and the rapid tempo of decisions. All the several types of transition can be found in recent decades. The President and the President-elect have been of the same party (Coolidge, Hoover) and of different parties (Wilson, Harding; Truman, Eisenhower); or the transition may be from Vice-President to President (Harding, Coolidge; Roosevelt, Truman)—a reminder that the Vice-President is potentially the President's understudy.

As might be expected, approaches to transition have ranged from sincere and rewarding effort to political posturing and outright obstruction. Probably the most drastic plan of transition yet conceived is the one attributed to Woodrow Wilson against the eventuality of Charles Evans Hughes' election in 1916. Wilson planned, if defeated for re-election, to request his Secretary of State to resign and then to name Hughes in his place; then Wilson would resign, along with Vice-President Marshall, and Hughes as Secretary of State would succeed to the presidency.[22]

The transition from Harding to Coolidge seems to have been facilitated through the intercession of Herbert Hoover

[22] *See President, Office and Powers,* 404.

as confidant to Harding, particularly during the President's fateful tour of the West. In the course of the journey Harding unburdened himself to Hoover on the many trials and tribulations of the administration. Hoover seems to have passed along much of this information to Coolidge for use against the responsible malefactors.[23] Although the electoral durability of Franklin Roosevelt successfully postponed transition problems for three terms, his further contributions to the subject are not especially positive. His negotiations with Hoover before his inauguration in 1933 seem to have produced little outcome. A determining factor was Roosevelt's apprehension that association with Hoover might result in a shared responsibility for Hoover's policies, even though the President-elect lacked authority to shape them.[24] As to the Roosevelt-Truman transition it is to be noted that Roosevelt selected his Vice-President by the offhand method suggested by his mandate, "clear with Sidney." And his illness precluded any preparation of the Vice-President. Mr. Truman came into office, as he put it, "without being briefed on the processes of current problems of government . . . and without knowing who the people were to whom he could best apply for counsel." [25]

His own difficult experience prompted him to forethought for the transition to the Eisenhower administration. Even while the presidential campaign of 1952 was in progress, the Republican candidate was given weekly reports of the Central Intelligence Agency. The President-elect, by designating his secretaries of State, Defense, and Treasury

[23] *See* Herbert Hoover, *The Memoirs of Herbert Hoover* (New York, 1952), 49 ff.

[24] *See* the account in Raymond Moley, *After Seven Years* (New York, 1939), 70 ff.

[25] Truman so informed Arthur Krock in an "exclusive" interview. *See New York Times,* February 15, 1950.

earlier than is customary, enabled them to confer with their counterparts in the Truman administration and so familiarize themselves with their future departments. The President-elect was represented by his future Director of the Bureau of the Budget as an observer while the final budget of the Truman administration was in preparation. The budget presents one of the most difficult phases of transition. The Budget and Accounting Act of 1921 requires the budget to be submitted fifteen days after Congress convenes. Since the new Congress was scheduled to meet on January 3, in accordance with the Twentieth Amendment, the due date of the budget was January 18, two days before the presidential inaugural, also set by the Twentieth Amendment. President Truman, then, prepared the budget under which President Eisenhower had to operate—a handicap somewhat reduced by the information gathered by the President-elect's observer.[26]

President Eisenhower received from the retiring President, too, three large volumes prepared by the National Security Council. They contained (1) a summary, country by country, of current United States policies; (2) an estimate of critical trouble spots; and (3) "eyes only" plans for dealing with an all-out Communist attack in Korea, Yugoslavia, or Iran. The compilation was prompted by Truman's first three months in office, much of it spent in poring over a large array of memoranda gathered with great difficulty from many departments to bring him current on policies.[27]

Summary and Assessment

How the President is selected does much, as we have discovered, to determine the ground rules under which the

[26] *See New York Times*, November 10, 1952.
[27] *See New York Times*, November 22, 1952.

social struggle proceeds in the political arena. The electoral vote system established by the founding fathers, seen in this perspective, shapes up as little less than an act of political genius. For that system elicits, if not compels, the kind of political behavior most appropriate to the peculiar characteristics of American society. These encompass, as we have noted, an elaborate complex of geographical and functional diversity.

The present scheme of electoral votes has served to guarantee a two-party system, basis of the remarkable capacity of the presidency for social integration. The major parties, in order to capture the highest office, have had to make a broad appeal to classes, groups, and sections. Conciliation and compromise perforce characterize the President's approach to problems. He has not been and cannot be exclusively the champion of some class or bloc. To become that would be to let the presidency go by default at the next election.

Nevertheless the electoral vote system has been attacked as not representing, on occasion, the will of the people. Such critics as Senators Lodge, Humphrey, and Kefauver have been disturbed because the system has sometimes resulted in the election of plurality Presidents. It would seem, however, that the Senators take an oversimplified view of the will of the people when they equate it with the counting of heads and the majority vote. The political consensus that is really significant in the United States, and for which the presidency is peculiarly adapted is that which crystallizes among diverse groups and localities.

We have considered the merits and demerits of the sundry proposals of Humphrey, Kefauver, Lodge, and others. All of them are objectionable for their tendency to weaken or destroy the two-party system and to replace it with a

multiparty structure. The presidential candidate, instead of making a broad appeal, would become the adamant spokesman for the particular segment on which he primarily relied for support. As a result the frequency of minority Presidents would be increased rather than reduced and, if anything, would become the rule. Presidential elections would be thrown repeatedly into the legislature for final settlement. This recourse, it is submitted, would destroy a valuable trait of the present system: namely, that nothing is more absolutely taken for granted than that the decision of the ballot box is final.

The proposal for a national presidential primary we have found wanting for its prohibitive expense to the candidate and its danger of fomenting wide and long-lasting schisms within the party. Also pertinent are some remarks of Adlai Stevenson:

> Many presidential possibilities will inevitably be incumbents of public office, and I simply do not see how it is possible for them to discharge the duties of their offices properly and at the same time campaign in each of the forty-eight states to the extent necessary to make their views sufficiently known for purposes of an informed election. This is especially true of persons holding executive positions with great and continuous administrative responsibilities.[28]

On the subject of presidential succession, which the founding fathers treated so incompletely, we have reviewed the several provisions of the Constitution and the Presidential Succession Act of 1947. Chief among the lacunae in these is the problem of the President's disability, raised by Mr. Eisenhower's illness. And there are other conceivable situations not covered by present law in which lack of specific arrangements might seriously hamper the machinery of government. A future President might conceivably be taken

[28] Quoted in David *et al., Presidential Nominating Politics in 1952,* Volume I, 222.

prisoner of war. If an atomic bomb were dropped on Washington, the President, if lucky, might be only temporarily injured or missing. Then what? Would the Vice-President succeed? If so, when? Would the country have to flounder aimlessly in its peril until the question could be resolved? To what would the Vice-President succeed? Suppose that the President is later found, or recovers, or escapes: will the Vice-President stay at the helm, or will the President again take over? None of these questions is answered under present law. Their potential importance suggests that they deserve to be deliberated and resolved in a calmer atmosphere than that of a sneak-attack, an actual invasion, or all-out war.

We have seen the vice-presidency as a long-neglected office recently given new importance. The significant changes have centered on its executive side. Its identification with the presidential administration has reached the point where a Vice-President, Mr. Nixon, can say that he regards his executive role as higher in obligation and importance than his legislative role. Proposals are afoot, with promise of realization, to enhance the vice-presidency as a ceremonial substitute for the presidency and to increase its staff and other facilities for party and executive tasks.

Much of the renewed interest in the vice-presidency has been spurred by the new urgency of an effective transition between administrations. The problem of continuity in policy, of an incoming President who can take over with immediate efficiency the projects and commitments of the outgoing, was brought into sharp relief by the abrupt and unprepared Roosevelt-Truman transfer as well as, later, by the illness of President Eisenhower. The Truman-Eisenhower arrangements seemingly provided something to build on for for the future.

The various developments and tendencies that we have been surveying represent the beginnings of an institutional adjustment of the presidency to what promises to be a long-lasting cold war. The freedom for maneuver of the Communist dictatorship and the potential of the atomic bomb for sudden devastation have made imperative the substitution of clear and certain procedures for the improvisations of the past and the filling of the dangerous lacunae that remain.

Index

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